(1) Supreme Court, U.S.
FILED

No. 991098 DEC 27 1999

OFFICE OF THE CLERK

IN THE
SUPRME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

MICHAEL BARTH,

PETITIONER,

v.

PUBLIC SERVICE ELECTRIC AND GAS; TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY; BERNARDS TOWNSHIP BOARD OF HEALTH; BERNARDS TOWNSHIP MUNICIPAL COURT; J. KNOX FELTER, JR., Senior Sanitarian, Bernards Township; PETER A. MESSINA, P.E., P.P. Township Engineer/Planner; PEGGY WARREN, Certified Tax Collector, Bernards Township; BARBARA J. PENCE, Township Administrator; J. DOE(S), individually and in their official capacities; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS, and various New Jersey State Statutes; A.D. RUNYON OIL COMPANY; HARRY P. BELDON, Attorney at Law,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
PETITION FOR WRIT OF CERTIORARI

BRIEF FOR PETITIONER

Michael Barth
P.O. Box 315
Liberty Corner, New Jersey 07938

38pp

QUESTIONS PRESENTED

Whether the New Jersey Court Rule 4:30A (Entire Controversy Doctrine) is unconstitutional under Article III, Section 2 and Article IV of the United States Constitution.

Whether Eleventh Amendment Immunity applies to New Jersey State Department of Environmental Protection and its Commissioner(s) when: District Court ruled plaintiff was entitled to sue the NJ DEP in Federal Court for a copy of a DEP report; NJ Statutes Expressly waived immunity by allowing the NJ DEP to be sued in "any court"; the NJ DEP admitted they could be sued in Federal Court under the New Jersey Tort Claim Act; the NJ Entire Controversy Doctrines requires suit in one forum; and defendants participated in discovery.

Whether Rule 56 Summary Judgment on Rule 12(c) motion for judgment on the pleadings is inappropriate when defendant did not comply with Rule 26(a) discovery Order.

Whether it is reversible error to dismiss Federal Natural Gas Pipeline Safety Act claim and refuse to issue order to show cause when District Judge admitted plaintiff entitled to injunctive relief under the Federal statute.

Whether Res Judicata applies when application previously rejected by United States Supreme Court in cases such as Montana v. United States, 99 S. Ct. 970, 973(1979).

Whether two attempts to influence Municipal Judge to deprive federal court of jurisdiction on removal shows pattern to satisfy Violation of RICO as articulated in United States Supreme Court cases including U.S. v. Russell, 225 U.S. 138 (1921).

Whether District Court sua sponte dismissal without giving plaintiff notice and an opportunity to be heard is reversible error when inopposite to Second Circuit Court of Appeals precedent. Thomas v. Scully, Thomas v. Scully, 943 F.2d 259, 260 (CA 2 1991); Perez v. Ortiz, 849 F.2d 793, 797 (CA 2 1988) on Constitutional Challenge to N.J. Entire Controversy Doctrine; New Jersey Eminent Domain

Statute; Freshwater Wetlands Protection Act and Rules; State and Local Laws related to Sewers; and RICO claims.

Whether in spite of sua sponte dismissal without opportunity to be heard, the following are unconstitutional under the Fourteenth Amendment of the United States Constitution: Freshwater Wetlands Protection Act and Rules; Bernards Township Local law related to sewers; Tax Sale and State Statute; N.J. Eminent Domain Act; and Sewer Tax.

Whether the Supreme Court ruling that Property Ownership is a fundamental property right in cases such as Loretto v. Teleporter, 458 U.S. 419, (1982) gives plaintiff standing under 42 U.S.C. § 1985.

Whether plaintiff had standing to sue under 42 U.S.C. § 4001 where NJ DEP and testimony before Bernards Township Planning Board indicated Bernards Township increased flooding in a flood zone adjacent to plaintiff's property.

Whether reversible error when District Court dismisses Federal Constitutional or 42 U.S.C. § 1983 Statutory Claims without reason in opposite to Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) and since 1983 plaintiff is never required to exhaust state remedies under Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); Mathews v. Eldridge, 424 U.S. 319 (1976) is the NJ Entire Controversy Doctrine unconstitutional and the notice provision of NJ Tort claim Act do not apply.

LIST OF PARTIES

PETITIONER - PLAINTIFF
MICHAEL BARTH

RESPONDENTS - DEFENDANTS

PUBLIC SERVICE ELECTRIC AND GAS;

TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY;
BERNARDS TOWNSHIP BOARD OF HEALTH;
BERNARDS TOWNSHIP MUNICIPAL COURT;
J. KNOX FELTER, JR., Senior Sanitarian, Bernards Township;
PETER A. MESSINA, P.E., P.P. Township Engineer/Planner;
PEGGY WARREN, Certified Tax Collector,
Bernards Township;
BARBARA J. PENCE, Township Administrator;
J. DOE(S), individually and in their official capacities;

STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS, (herein also referred to as NJ D.E.P. defendants)

various New Jersey State Statutes;

A.D. RUNYON OIL COMPANY;
HARRY P. BELDON, Attorney at Law,

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IN THE
SUPRME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below in the Third Circuit Court of Appeals in Barth v. PSE&G et al: Order filed September 28, 1999 affirming District Court Order filed February 22, 1999 CA 3 Docket 99-5190; Denial of Petition for Rehearing in CA3 Dockets 97-5368 & 98-5059; and Court of Appeals' order affirming district court order entered May 7, 1997 (denial of order to show cause for a preliminary injunction) and June 18, 1997 (denial of stay of state court proceedings and reassignment to Newark).

OPINIONS BELOW

The Opinion in Third Circuit Docket 99-5190 (affirming District Court Order filed February 22, 1999) is not designated for printing according to the Third Circuit Order. There was no printing designation on the Third Circuit orders in 97-5368 or 98-5059. It appears the the District Court's Opinion in 97-2163 is not for publication.

JURISDICTION

The United States Supreme Court has jurisdiction under 28 U.S.C. § 1254. This matter was final before the Third Circuit Court of Appeals when an Opinion was filed on September 28, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appendix includes the following: Articles I, III and IV; and Amendment V, XI, and XIV; 18 U.S.C. § 1503; 18 U.S.C. § 1961; 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 4001; 49 U.S.C. 60101 et. seq.; 49 U.S.C. §60118(a)(1); 49 U.S.C. §60121; 49 App. § 60101 et. seq.; 49 App. §60121; and 49 C.F.R. 192.327.

SUMMARY STATEMENT OF CASE AND RELATED CASES AND PROCEEDINGS

The relevant facts and the proceedings that took place in the lower courts are as follows.

On March 25, 1997, A.D. Runyon Company filed suit against Mr. Barth, in Superior Court of New Jersey, Law Division, Special Civil Part. Docket 979-97 (PA 85). Consistent with the New Jersey Entire Controversy Doctrine, Mr. Barth countered sued Runyon Oil and its attorney in federal district court. Complaint ¶ 89-95. The complaint stated in part that Runyon Oil failed to deliver the proper number of gallons for oil that would have facilitated the winter relocation of the oil tank in Mr. Barth's home necessary to complete the unreasonable forced connection to the Bernards Township's sewer system. Runyon Oil and its attorney Harry Beldon settled out of court with Mr. Barth. Stipulation of dismissals was filed in New Jersey Superior Court on June 19, 1997 and in Federal district Court in the instant action on August 26, 1997. District Court Docket No. 20.

The New Jersey Department of Environmental Protection N.J.D.E.P.E. ruled that all wetlands on Mr. Barth's property were of the most minimal resource value. (Property located at Block 133, Lot 4, Bernards Township, Somerset County, New Jersey.) PSE&G originally sought this interpretation and received a stream crossing across plaintiff's property. Complaint at 84. Plaintiff also sought a wetland delineation based on that same wetland classification. Mr. Barth relied on that same classification by the DEPE and had two additional sewer laterals installed to subdivide the property as agreed upon by Bernards Township and also to have the property zoned for raising and keeping of livestock. Both were done at substantial expense to Mr. Barth.

Subsequently on November 22, 1995, the N.J.D.E.P.E arbitrarily ruled that the wetlands on Mr. Barth property included exceptional valued wetlands and that Mr. Barth should get a new interpretation and formal delineation of the wetlands for his use of the property but the NJ DEPE refused to require PSE&G to get a new interpretation of

the same wetlands on Mr. Barth's property that PSE&G intended to destroy for its planned condemned use of Mr. Barth's property.

Mr. Barth requested an Order to Show Cause why the N.J.D.E.P.E. should not be ordered to provide plaintiff with a copy of a report, NJ DEP file No. 02-010-96. The report was the D.E.P.E. investigation of a Bernards Township Road Regrading Project that caused flooding on plaintiff's property. The District Court rejected plaintiff's request for an order to show cause saying it was cause the NJ DEPE irreparable harm. Amended Order May 6, 1997. In the District Court's subsequent order dismissing the complaint, Judge Thompson ruled that plaintiff was in fact to entitled to bring a cause of action in Federal District Court to obtain a copy of the DEPE report but ruled that the claim was moot since the D.E.P.E. provided plaintiff with a copy of the report. Opinion February 19, 1999.

PSE&G contacted plaintiff to obtain an easement to run a gas pipeline across Mr. Barth's property. Mr. Barth indicated a lack of interest unless PSE&G agreed to indemnify Mr. Barth for any loss, damages, or otherwise. PSE&G requested permission to do environmental tests on plaintiff's property and entered an six-month agreement on June 28, 1993, to reimburse and indemnify landowner for property damage and that PSE&G would give Mr. Barth three days notice before any entry upon Mr. Barth's land.

PSE&G's contractors damaged Mr. Barth's property including irreparable damage to a row of Spruce Trees. PSE&G refused to honor its agreement to compensate Mr. Barth for the damage caused by its contractors so Mr. Barth refused to enter into an easement agreement with PSE&G. PSE&G went ahead without permission and installed a "temporary gas line" on the street over the bridge adjacent to the southwest corner of plaintiff's property. Complaint at 51. The pipe was laid on the deck of the bridge and was paved over with no other protection. Beams for a guardrail were driven into the ground inches from the pipeline. A PSE&G appraiser certified that on February 4, 1994 he entered upon plaintiff's property. This was without permission as the six-month agreement terminated on December 28, 1993. PSE&G's gas pipeline adjacent to plaintiff's

property was ruptured by Bernards Township contractors. The contractors asked Mr. Barth to call 911 on their behalf.

On March 26, 1997, PSE&G filed suit to condemn Mr. Barth's property in the Law Division of the Superior Court of New Jersey. Mr. Barth filed suit against PSE&G in federal district court for matters that included items the NJ Office of Administrative law indicated could not be combined in a condemnation proceeding. Default was entered against PSE&G on August 22, 1997 for those claims Mr. Barth filed against PSE&G. The PSE&G state based complaint against Barth was dismissed on June 13, 1997. On June 15, 1997, Judge Thompson denied plaintiff's request for an order to show cause to enjoin the related state court actions PSE&G v. Barth. The New Jersey Appellate held that PSE&G's condemnation action against Mr. Barth was final for appeal on October 22, 1999.

The New Jersey State court and previous OAL proceedings were filled with procedural infirmities. For example: Mr. Barth was not served by the Board of Public Utilities with the required notice of the condemnation; The case was removed from the NJ OAL to Federal District Court, remanded to the BPU at the request of the NJ Attorney General's Office, and never transferred again to the NJ OAL; The NJ OAL refused to hear related pipeline safety issues; The OAL would not allow Mr. Barth to call witnesses; The OAL relied upon transcripts that PSE&G provided the OAL that PSE&G refused to provide a copy to Mr. Barth; The NJ superior court judge provided direction to the condemnation commissioners and copies PSE&G with its correspondence but did not provide Mr. Barth with a copy; The trial judge refused to allow Mr. Barth to file an Answer; The condemnation commissioners did not provide Mr. Barth notice of the hearing as required by court order or state law; The Commissioner's relied upon evidence provided by PSE&G that was never served upon Mr. Barth; and the Condemnation commissioner was called by PSE&G as its witness in the state court proceeding when state statute required the Commissioner be called as the court's independent commissioner. Subsequently, the Bernards Township engineer department provided evidence that PSE&G title search of Mr. Barth's property was defective and that PSE&G had installed its pipeline on

Mr. Barth's property that was not within any Township recorded right of way.

On December 5, 1995, Bernards Township filed suit against Barth in Bernards Township Municipal Court. Municipal Court Docket No. 1372 (PA 83). Mr. Barth removed the case to federal district court to challenge, the constitutionality of the Bernards Township ordinance. New homes are still being built in the township with septic systems, including a proposed septic system on property within 200 feet of plaintiff's property that will support a building over 60,000 square feet. The Municipal Judge admitted he was not a constitutional court. During the Municipal Proceeding, the Bernards Township Municipal Judge, the Township Prosecutor, and Defendant Felter huddled around the judge's desk in open court, with the judges hand over the microphone. They plotted how to deal with the case in Bernards Township Municipal court to defraud the federal district court out of jurisdiction of that proceeding that Barth had removed to federal court. At the end of the proceeding, the Municipal Judge called the Township Administrator to discuss the case ex parte. (During discovery, the Administrator admitted the Judge called her out in open court to discuss an issue ex parte but she indicated this was a different case they discussed ex parte.) Plaintiff ordered a tape copy of the municipal proceeding but received a copy with several portions deleted. The Municipal Court refused to provide complete copies of the tape recording taking place during that time. Because of the procedural deprivations in Municipal court, plaintiff was forced to connect to the township sewers. This caused undue hardship to plaintiff's property and required the relocation of the oil tank.

By letter dated March 6, 1997, Bernards Township indicated it planned to sell Barth's property in a tax sale for unpaid sewer taxes. Mr. Barth notified the Township that it disputed the amount the township indicated was owed but was not given an opportunity to dispute the amount. The property was sold in a tax sale. Mr. Barth paid the taxes due to the improprieties in the Township proceedings.

Bernards Township admitted during discovery that its storm sewers owned are installed below ground on landowner's private property and outside the Town's right-of-way. Bernards Township re-graded the

road bordering the south of the subject property that created, in effect, a weir dam, subjecting the landowner's property to additional flooding. As stated, the NJ D.E.P. concluded that Bernard Township did raise the road and cause additional flooding of plaintiff's property but refused to turn over a copy of their report. Bernards Township also negligently redesigned the Road that borders the front of plaintiff's property that causes water to run down and floods plaintiff's driveway. (The township installed a storm basin on the road downhill from plaintiff's driveway. The water basically runs along 800 feet of curbed roadway before it passes plaintiff's driveway and enters the basin.) Bernards Township also negligently constructed a storm water system that creates underground flooding on plaintiff's property.

Consistent with the New Jersey Entire Controversy Doctrine, on April 17, 1997, Barth filed in Federal District Court, Newark New Jersey, suit against PSE&G, A.D. Runyon Company and its attorney Harry Beldon, "Bernards Township" defendants, the State of New Jersey "defendants" various state laws, court rules, and local ordinances.

By letter dated April 14, 1997, Barth asked for the following Show Cause Order: Order PSE&G to remove a temporary natural gas pipeline that was installed adjacent to plaintiff's property in violation of the Federal and New Jersey Pipeline Safety Acts; Enjoin Bernards Township Tax Sale of plaintiff's property; Order Bernards Township Municipal Court to plaintiff a copy of a tape recordings of a related Municipal Court hearing; Order Bernards Township to remove Township's storm pipes illegally placed under plaintiff's property; Order Bernards Township to remove the road that is causing flooding on plaintiff's property; Order Bernards Township to remove the underground flooding of plaintiff's property caused by their improperly constructed storm sewers; Order Bernards Township to correct the flooding condition of plaintiff's driveway caused by the improper construction of a road and storm sewer system they own in front of plaintiff's property; and Order the N.J. D.E.P. to provide plaintiff a copy of a D.E.P. report indicating that Bernards Township illegally raised the level of a road in a flood plain causing additional flooding to plaintiff's property. Judge Thompson denied the request for an order to show cause on May 7, 1997.

Default was entered against PSE&G and Bernards Township Sewage Authority on August 22, 1997. PSE&G complaint against Barth was dismissed on June 13, 1997. On June 15, 1997, Judge Thompson denied plaintiff's request for an order to show cause to enjoin the related state court action PSE&G v. Barth.

Plaintiff filed a notice of appeal of both denials: CA 97-5368 and 98-5059. Plaintiff also filed a motion to have the case transferred upon remand and disqualify Judge Thompson from the case because she erroneously decided a motion before the return date when the change of the status of a case sought to be stayed had been communicated to her honor.

Honorable Freda L. Wolfson, United States Magistrate Judge, ruled on October 22, 1998 was discovery was not stayed and that interrogatories served and answers due prior to the date on which a motion for summary judgment was filed must be answered. Docket entry 74. Judge Wolfson ordered defendants including the NJ D.E.P. to provide initial disclosure. Docket entry 53. During a teleconference with Judge Wolfson, counsel for the N.J. D.E.P. requested an extension for its discovery. July 17, 1998.

PSE&G illegally entered plaintiff's property in early September but Judge Thompson refused to act on plaintiff's request to enjoin PSE&G. The Bernards Township Planning Board was reviewing an application on property within 200 feet of plaintiff's that included the construction of a mammoth septic field and raising the flood plain. Judge Thompson refused to issue an order to show cause to halt either action.

Judge Thompson dismissed the complaint and denied plaintiff's cross-motions. The Court of Appeals affirmed the District Court opinion without oral argument and without reference to any case law.

REASONS FOR GRANTING THE PETITION

There are compelling reasons for the exercise of the Court's discretionary jurisdiction in this matter. Not only is the decision of the lower court erroneous but there is national importance in having the Supreme Court decide the questions involved. The decision of the court below is in conflict with previous decisions of this court.

POINT I New Jersey Court Rule 4:30A (Entire Controversy Doctrine) is unconstitutional under Articles III, § 2 and Article IV § 1 of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment.

Under Counts 73 through 75, NJ Court Rule 4:30A ("Entire Controversy Doctrine") violates Articles III, § 2 and Article IV § 1 of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment. The Doctrine violates Article III, § 2 of the United States Constitution which authorizes federal courts to decide only "cases" or "controversies." It also violates Article IV § 1 of the Constitution which states that "full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other States; And the Congress may be general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." It also violates the Due Process Clause of the Fourteenth Amendment. Complaint at paragraph 97.

Judge Thompson admitted the rule is burdensome but dismissed the claim *sua sponte*. Opinion, February 22, 1999, page 24. The Rule is promulgated by the New Jersey Supreme Court and accordingly cannot be challenged in New Jersey State court because of the inequality of forums. (Citation omitted.) Mr. Barth was unnecessarily sued in several different New Jersey state forums that under the ECD required counter-suit in one forum. In the interest of justice, Mr. Barth sued defendants in one forum, federal district court.

The Doctrine is unconstitutional in that it fosters uncertainty in an area of law that must remain clear. The doctrine is overly burdensome and the application too arbitrary, particularly when someone attempts to exhaust administrative remedies. The Doctrine

basically requires someone to bring cases that have not yet ripened. In effect, the doctrine wrongfully deprives one of his or her "day in court". Under the New Jersey Entire Controversy, any dismissal of the complaint against any defendant for not utilizing state procedures (regardless of the futility of utilizing the state procedures) should have been without prejudice. The doctrine cannot be relied upon as faithful. Accordingly, the rule or Doctrine should be declared unconstitutional under Articles III, § 2 and Article IV § 1 of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment.

POINT II Eleventh Amendment Immunity does NOT apply to the New Jersey State Department of Environmental Protection where the District Court ruled plaintiff was entitled to sue the NJ DEP in Federal Court for a copy of a DEP report; where the New Jersey Statute Expressly waived immunity by allowing the NJ DEP to be sued in "any court"; where the defendants admitted they could be sued in Federal Court under the New Jersey Tort Claim Act; where the NJ Entire Controversy Doctrines requires suit in one forum; and where defendants participated in discovery.

The N.J. D.E.P. Violated Plaintiff's Rights Protected by the Fifth and Fourteenth Amendments; 42 U.S.C. § 1983, and Article I of the N.J. Constitution. Complaint Counts 45 through 48.

Judge Thompson ruled plaintiff could bring an actionable claim in Federal District Court against the NJ D.E.P.E. and its Commissioner to produce a report under, *inter alia,* the New Jersey right to know statute N.J.S.A. 47:1A-1 *et seq.*, and the common law right to know. Plaintiff requested the NJ D.E.P. investigate Bernards Township's raising of the Minebrook road surface in a flood plain. Complaint para 20. The DEP report concluded Bernard Township did raise the road and cause additional flooding of plaintiff's property. The District Court refused to grant an order to show cause why the DEPE should not produce the report saying it would cause the DEPE "irreparable harm". However, under the statute cited by Judge Thompson, plaintiff is entitled to costs incurred to file suit to force the DEP defendants to provide a copy of the report, including costs on appeal. N.J.S.A. 47:1A-1 *et seq.* The court ruling that the claim was

mooted is inconsistent with the court's own standard and reversible error including its May 7, 1997 denial of plaintiff's request for an order to show cause.

Judge Thompson stated New Jersey could waive its Eleventh Amendment immunity. By the DEPE's own admissions, suit against the State of New Jersey, Department of Environmental Protection, and its Commissioners was not prohibited by Eleventh Amendment. There are a number of ways immunity was expressly waived under the New Jersey statutes. For example: The DEPE defendants plainly consented to suit in federal district court in the most express language. Defendants argued they are liable for suit in Federal District Court under the New Jersey Tort Claims Act. They admit the constitutional claims can be brought them in Federal District Court. They participated in discovery and even asked for an extension for discovery. Moreover, under New Jersey law, private citizens are allowed to bring suit in Federal Court against the New Jersey Department of Environmental Commission, its Commissioner(s) and any related rules. N.J.S.A. 2A:35A-4, 10 (bring suit against DEP in any court). The New Jersey Entire Controversy Doctrine Rule expressly waives immunity from suit in federal court as it requires suit in one forum. The Eleventh Amendment does not immunize unconstitutional acts of the DEP defendants. Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982). Furthermore, the New Jersey statutes define the DEP defendants as "persons" for the purposes of 42 USC §1983. *See* N.J.S.A. 2:35A-3; 58:16A-51 (agency of the state is a "person").

POINT III Rule 56 Summary Judgment on Rule 12(c) motion for judgment on the pleadings inappropriate when defendants not in compliance with Rule 26(a) Order requiring compliance with Discovery request.

By Judge Thompson own holding, it was reversible error to grant Summary Judgment on a Rule 12 C judgment on the pleading; to quash plaintiff's interrogatories; and deny plaintiff's motion to compel discovery. Freda L. Wolfson, United States Magistrate Judge, ruled on October 22, 1998 that discovery was not stayed and that interrogatories served and answers due prior to the date on which a

motion for summary judgment was filed must be answered. Docket No. 74. Judge Wolfson ordered on February 18, 1998 that the NJ DEP defendants provide initial disclosure as required by F.R.C.P. 26(a). Id. at 53. At a pretrial conference, N.J. D.A.G. Patterson asked for an extension of discovery. Furthermore, on October 2, 1998 counsel for the N.J. D.E.P, the N.J. Attorney General's Office indicated it would answer plaintiff's interrogatories within two weeks. On or about October 23, 1998 the N.J.D.E.P moved for judgment on the pleadings (returnable November 16, 1998). On or about November 13, 1998, the N.J.D.E.P. moved to quash plaintiff's interrogatories (returnable December 7, 1998). The DEP defendants omitted a statement of material facts as required by the local rules of court. The District Judge held that plaintiff did not provide sufficient evidence to preclude dismissal of the complaint. Opinion, February 22, 1999 page 20. However, the moving party never satisfied its burden as required by Supreme Court precedent. Accordingly, it was clearly an error to grant summary judgment on a motion for judgment on the pleadings. At a minimum, the dismissal should have been without prejudice.

POINT IV Reversible error to dismiss Federal Natural Gas Pipeline Safety Act claim and refuse to issue order to show cause when District Judge admitted plaintiff entitled to injunctive relief under the Federal statute.

Under counts 49 and 50 PSE&G is liable for violating the Federal Natural Gas Pipeline Safety Act and the New Jersey Natural Gas Pipeline Safety Act. Judge Thompson ruled PSE&G was required to comply with federal and state pipeline safety standards. Opinion filed February 22, 1999 *citing* 49 U.S.C. §60118(a)(1); N.J. Stat. Ann. 48:9-33. PSE&G was required to construct this pipeline in accordance with the Minimum Federal Safety Standards of the U.S. Department of Transportation as published in Part 192 of Title 49, Code of Federal Regulations, and any amendments thereof. Under that code, each main must be installed with at least 24 inches of cover. CFR Section 192.327. Under New Jersey law, "such pipes or conduits shall be laid at least 2 feet below the surface of the road and shall not damage private property. N.J.S.A. 49 App. § 60101 *et. seq.* states that it is a violation of Federal Law to construct a gas pipeline

in violation of Federal Regulations. 49 App. §60121 states that citizens may commence a civil action for relief against any person violation this chapter. N.J.S.A. 48:9-33 provides that it is a violation of State law to construct a natural gas pipeline that violates federal standards. The purpose of the law is to bring New Jersey into compliance with federal safety regulations. In constructing a pipeline in violation of Federal and State Law, PSE&G is liable for violating the Natural Gas Pipeline Safety Act for $10,000 a day from August 3, 1993 or $500,000 and liable to the landowner for violating the New Jersey Natural Gas Pipeline Safety Act in the amount of $10,000 a day from August 3, 1993 or $500,000. A private person is permitted to bring an action for damages other than costs and fees under federal law 49 U.S.C. §60121 and a private person is also permitted to bring an action for injunctive or compensatory relief under state law. N.J. Stat. Ann. 48:9-33(c). *See e.g.,* Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co., 70 N.J. Eq. 536 (Ch. 1905) (Showing special damage private party can bring action under state statute.) N.J.S.A. 48:7-2.

PSE&G has created a public safety hazard. It is undisputed that on or about August 3, 1993, PSE&G contractors installed a "temporary gas line" on the street over the bridge adjacent to the southwest corner of plaintiff's property. Complaint para. 51. PSE&G testified before the New Jersey Office of Administrative Law that the pipe was laid on the deck of the bridge and paved over with no other protection. By PSE&G own admission, PSE&G did not construct the pipeline in accordance with these rules requiring 24 inches of cover. Beams for a guardrail have been driven into the ground inches from the pipeline. Plaintiff provided pictures that a jury could review and clearly determine PSE&G is liable on these counts. In addition, with additional discovery, PSE&G should be ordered to produce copies of the recent PSE&G video taping of work done on the pipeline that crossed appellant's property.

Judge Thompson incorrectly assumed that since plaintiff had not provided an expert report, plaintiff could not set forth any actual evidence that creates a genuine issue of material facts. However, she inappropriately misapplied the standard for summary judgment as

PSE&G's purported Local Rule 12(G) statement of "material facts" did not address the facts.

Judge Thompson ruled Barth was permitted to bring an action under federal law for injunctive relief to ensure compliance with such standards. Moreover, PSE&G admitted the plaintiff was entitled to costs and fees for suing for injunctive relief. Without basis the District Court rejected Mr. Barth's request for an order to show cause for injunctive relief. By Judge Thompson's own admission, she was required and erred in not issuing the order to show cause she denied on May 7, 1997 and she erred in granting PSE&G summary judgment.

POINT V District Court's application of Res Judicata previously rejected by United States Supreme Court in cases such as Montana v. United States, 99 S. Ct. 970, 973(1979).

Judge Thompson order of February 19, 1999 barred plaintiff claims against PSE&G on the basis of res judicata. However, the New Jersey state court case she relied upon was not determined to be final until October 22, 1999. (See Appendix.) According to the standard set in cases such as Montana v. United States, 99 S. Ct. 970, 973(1979), the federal litigation could not be precluded by a state court case.

On March 26, 1997, PSE&G filed suit against Barth, in Superior Court of New Jersey, Law Division. Docket SOM-L-549-97. Consistent with the New Jersey Entire Controversy Doctrine, on April 17, 1997, Barth filed in Federal District Court, Newark New Jersey, suit against PSE&G. On June 15, 1997, Judge Thompson denied plaintiff's May 13, 1997 request for an order to show cause to enjoin the state court action PSE&G v. Barth. In doing so, the District Court surrendered jurisdiction to the state court in opposite to Supreme Court cases such as Moses H. Cone Memorial Hosp. V. Mercury Const. 460 U.S. (1983). Moreover, default was entered against PSE&G in the instant case on August 22, 1997 (Appendix). Furthermore, PSE&G complaint against Barth was dismissed without prejudice on June 13, 1997. Morris County v. 8 Court Street Ltd. 223 N.J. Super. 35 (A.D. 1998). The New Jersey action she relied

upon lacked jurisdiction to hear PSE&G claims once Barth filed suit in federal court and PSE&G complaint was dismissed.

The instant litigation is not precluded on *res judicata* grounds as any remedies provided under state law were inadequate and foreclosed. There was nothing presented by PSE&G that would indicate the state court considered the matters before this court. By PSE&G own admission, the federal litigation was not precluded on *res judicata* grounds. They admit the New Jersey state court never actually litigated the claims such as trespass and other property deprivation raised in the instant case. PSE&G also admits the state court granted PSE&G the right to take appellant's property while in default in federal district court. For PSE&G to argue the default was irrelevant is to admit the state case was not preclusive. Furthermore, by PSE&G own claims, it violated due process for the state court to grant PSE&G the right to condemn when they were in default on claims that PSE&G admits if true would prohibit them from exercising the power of eminent domain. Not surprising but proof that this case is not precluded is the fact that PSE&G is currently arguing in state court that Mr. Barth request to file an Answer in state court is precluded by the federal case. For PSE&G to argue the state case is precluded by the federal case is an admission that the federal case is not precluded by the state case.

Moreover, PSE&G admitted the state court never considered the entire controversy as presumably the state court deferred to the federal court to litigate the remaining claims. On its face this shows the state court proceedings constitutionally infirm. Furthermore, PSE&G themselves admitted the state proceedings were null and void based on their defective title search. They themselves admit that appellant has to initiate an inverse condemnation claim against PSE&G to complete compensation for the rest of the pipeline on appellant's property. PSE&G offers no support how that translates to constitutional due process. Accordingly, the instant litigation was not precluded.

Under counts 54-61, PSE&G is liable for trespass and destruction of trees; Breach of Contract; Trespass to Land; Negligence; Bad Faith; and Waste. PSE&G never disputed the existence of a contract

between Barth and PSE&G. Apparently Judge Thompson was not sure whether plaintiff's case was barred by claim preclusion so the District court raised a Tort Claims Act defense for PSE&G that PSE&G never raised. Opinion February 22, 1998, note 1. The District Court dismissed tort claims against PSE&G sua sponte without giving plaintiff an opportunity to be heard. PSE&G never raised the defense of the New Jersey Tort Claims Act as it does not apply to PSE&G. N.J.S.A. 59:1-1. She erroneously concluded this precluded the claims for trespass, negligence and waste.

POINT VI Two incidents of attempt to influence Municipal Judge to deprive federal court of jurisdiction shows pattern to satisfy Violation of RICO as articulated in United States Supreme Court cases including U.S. v. Russell, 225 U.S. 138 (1921).

In the instant case for example, defendants had knowledge and notice of a pending judicial proceeding in Federal Court. Township of Bernards v. Barth v. Bernards Township Sewage Authority et al 95 Civ. 6485 (AET). Defendants acted corruptly, that is, with the intent to influence, obstruct, or impede the Federal Proceedings in its due administration of justice. For example: The Bernards Township Municipal Judge, the Township Prosecutor, and Defendant Felter (the plaintiff in that case) huddled around the judges desk in open court, with the judges hand over the microphone, and plotted how to deal with the case in Bernards Township Municipal court to defraud the federal district court out of jurisdiction of that proceeding that Barth had removed to federal court. Complaint paragraph 39. Mr. Barth was not permitted to join their "side-bar" conversation but could hear them whispering. Furthermore, at the end of the second municipal hearing, the Judge called Township Administrator Barbara Pence forward to speak with him about the case. A pattern was shown when Defendant Pence answered in an interrogatory that yes the judge once called her forward to speak about the case. Defendant Pence claimed it was a different case she was going to talk about ex parte. This proved a pattern. Obstruction of justice is a violation of the RICO laws. 18 U.S.C. § 1961 citing § 1503. A visit alone is punishable. U.S. v. Russell, 255 U.S. 138 (1921). Corrupt endeavor spells out the crime although success may aggravate the crime. U.S. v. Solow,

138 F. Supp. 812 (D.C.N.Y. 1956). Accordingly, it was reversible error to dismiss the RICO claims.

The municipal court refused to provide a complete copy of the tapes of the hearing on January 30, 1996, Township of Bernards v. Barth, C-2161. Under Counts 31 through 32, Bernards Township Liable for Violating the New Jersey "Right to Know Law", N.J.S.A. 47:1A-1 *et seq.*, and the Common Law right to know. This relates to complete transcripts of the municipal court hearing on January 30, 1996, Township of Bernards v. Barth, C-2161. Complaint paragraphs 39 - 42. The Bernards Township Municipal Court refused to provide plaintiff with a complete copy of a tape recording of a Municipal Court hearing but had portions deleted from the copy provided to the landowner. Judge Thompson admitted plaintiff was entitled to a copy of the entire proceeding. As a matter of law, this should include that portion related to the period when the Municipal Judge, the Municipal Prosecutor, and defendant Felter gathered around the judges chair for a side-bar conversation that excluded Mr. Barth who was being accused in that matter.

Contrary to Judge Thompson's claim there is no proof Mr. Barth ever received such a complete copy. If such a copy exists, the Bernards Township defendants should provide a copy to the court and serve on all counsel in this matter. Moreover, Judge Thompson's suggestion plaintiff should apply to New Jersey Superior Court for a copy of the transcripts and tapes is reversible error. Plaintiff was entitled to a copy through discovery and judge Thompson committed reversible error in not ordering that plaintiff receive a copy. By opposing counsel's own admission, plaintiff was only provided what the Municipal Court Administrator deemed "relevant".

POINT VII District Court sua sponte dismissal without giving plaintiff notice and an opportunity to be heard is inopposite to Second Circuit Court of Appeals precedent. Thomas v. Scully, 943 F.2d 259, 260 (CA 2 1991); Perez v. Ortiz, 849 F.2d 793, 797 (CA 2 1988) on Constitutional Challenge to N.J. Entire Controversy Doctrine; New Jersey Eminent Domain Statute; Freshwater Wetlands Protection Act and Rules; State and Local Laws related to Sewers; and RICO claims.

The District Court sua sponte dismissal without giving plaintiff notice and an opportunity to be heard is inopposite to Second Circuit Court of Appeals precedent. Thomas v. Scully, 943 F.2d 259, 260 (CA 2 1991); Perez v. Ortiz, 849 F.2d 793, 797 (CA 2 1988) on Constitutional Challenges to the N.J. Entire Controversy Doctrine; the New Jersey Eminent Domain Statute; the Freshwater Wetlands Protection Act and Rules; State and Local Laws related to Sewers; and RICO claims.

Judge Thompson admitted that no defendant defended the constitutional challenge to the Bernards Sewer tax. District Court Order February 19, 1999. Judge Thompson admitted that no defendant defended the constitutional challenge to the New Jersey Eminent Domain Statute. District Court Order February 19, 1999. Judge Thompson admitted that no defendant defended the constitutional challenge to the New Jersey Entire Controversy Doctrine. District Court Order February 19, 1999. Under Counts 42 through 44, The N.J.S.A. 13:9B-1 *et seq.* (Freshwater Wetlands Protection Act) and N.J.A.C. 7:7A-1 *et seq* (Freshwater Wetlands Protection Act Rules) are Unconstitutional. Judge Thompson stated no defendant defended the constitutionality of the Act or the Rules. Opinion filed February 22, 1999 page 19. Judge Thompson committed reversible error in dismissing Counts 42 through 44 without an opportunity to be heard. F.R.C.P. 12(b)(6).

The district court erred by dismissing *sua sponte* RICO claims when defendants admit they did not move to dismiss claim that Bernards Township, the Bernards Township Board of Health, the Bernards Township Sewerage Authority, J. Knox Felter, Jr., Barbara J. Pence are liable for violating 18 U.S.C. § 1961 et seq. (RICO). See Opinion, February 22, 1999; Reply Brief, Yurasko page 2.

Opposing counsel admits he did not move to dismiss the RICO claims against the Bernards Township Non-Inverse Defendants and that the district court dismissed the count *sua sponte*. Plaintiff provided a legal basis for the RICO claims. Bernards Township Non-Inverse Defendants liable for violating RICO.

A district court may not dismiss a complaint *sua sponte* without giving the plaintiff an opportunity to be heard. Her *sua sponte* dismissal was reversible error.

Moreover, Judge Thompson provided no basis for dismissing the counts that Bernards Township, the Bernards Township Board of Health, the Bernards Township Sewerage Authority, J. Knox Felter, Jr., Barbara J. Pence, are liable for Fraud, Malicious and Tortious Interference with a Contractual Relationship, Malicious Prosecution, Abuse of Process, Negligence. Complaint paragraph 44. Her scattergun approach to apply the Tort Claim act was reversible error. Judge Thompson provided not basis for dismissing the count of Malicious Prosecution and provided no basis whatsoever for dismissing the count of Wrongful Interference. The court was required to accept as true that on or about December 5, 1995, J. Knox Felter Jr., Bernards Township Sanitarian, filed a summons in Municipal Court, Bernards Township. Township of Bernards v. Barth, C-2161. Complaint Paragraph 37. In that summons, Bernards Township alleges that the landowner failed to connect property into the sanitary sewer within the required time period in violation of the Township Ordinance BH: 13-2.2. There was no probable cause for the issuance of such an order. Accordingly, Mr. Felter, Bernards Township, the Sewerage Authority and the Bernards Township Board of Health are liable for Malicious Prosecution and for the wrongful interference with plaintiff's possession and enjoyment of property. Judge Thompson never addressed the issue of wrongful interference with possession and enjoyment of property. Again, the scattergun approach to applying the Tort Claim act to these counts fails. Under Counts 10 and 11, Bernards Township is liable for Trespass-Destruction of Property and Nuisance. It is not clear on what basis Judge Thompson dismissed this count. If on the basis of the Fourteenth Amendment, that was reversible error. Alternatively, the counts are still valid as Judge Thompson never dealt with the counts. As stated in the Complaint, Bernards Township continues to trespass on landowner's property through the unconstitutional taking without compensation. Id. at 22. There is substantial damage to landowner's property resulting from the trespass. Id. Defendants are interfering with the use and enjoyment of defendant's property. Id. at 24.

Therefore, Bernards Township is liable for trespass and destruction of plaintiff's property and liable for creating a nuisance.

POINT IX In spite of sua sponte dismissal without opportunity to be heard, the following are unconstitutional under the Fourteenth Amendment of the United States Constitution: Freshwater Wetlands Protection Act and Rules; Bernards Township Local law related to sewers; Tax Sale and State Statute; N.J. Eminent Domain Act; and Sewer Tax.

Barth owns the property that the NJDEP ruled on the wetlands classification. For the same piece of Barth's land the NJ DEP ruled that for PSE&G the wetlands are of the most minimal resource value and the DEP granted PSE&G a stream encroachment permit for that portion crossing plaintiff's property. Conversely, for Barth, who owns a fundamental constitutionally protected right, the DEP ruled the wetland is of the most protected value. This impacts plaintiff's ability, for example, to subdivide the property. The NJ DEP refused to require PSE&G to have the land redelineated but requires plaintiff to have the land redelineated. The DEP arbitrarily and discriminatorily applied the law and arbitrarily and discriminatorily treated PSE&G and Barth differently. The arbitrary enforcement means the law and rules are vague. Without discover, the Complaint clearly shows the Act or its regulations are vague on their face or as applied. Grayned v. City of Rockford, 408 U.S. 104, 108-109 (vague law impermissibly delegates basic policy matters to ... for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.) The Wetlands Protection Act Rules are part of the New Jersey Department of Environmental Protection. Opposing counsel does not dispute that his clients classified the wetland's of plaintiff-appellant' property at a lower standard for PSE&G and a higher standard for Mr. Barth. She argues this is consistent with state statutes, rules or otherwise. Such an admission of the opposing party is *prima facie* proof of unconstitutionality. Moreover, those wetlands identified by the defendants as exceptional would by their own standards be federal protected priority wetlands and accordingly the instant claims within the jurisdiction of a federal court. Judge Thompson erroneously ruled there was no evidence that the Act or its regulations are vague on their

face or as applied. Opinion, February 28, 1999. However, accepting the complaint as true, it is clear the Act and its regulations are vague on their face or as applied. Accordingly, the act and rules are unconstitutional under the Fourteenth Amendment of the United States Constitution.

Bernards Township Local law related to sewers are unconstitutional. The Bernards Township Board of Health Ordinance BH:13-2.2 is unconstitutional under *U.S. Const.* Amend XIV; 42 U.S.C. § 1983; *N.J. Const.* Art. I, par. 1. A Township Ordinance is a state statute for purpose of review by a Federal Court. *See e.g.,* First Lutheran Church v. Los Angeles County, 482 U.S. 304 n. 8 (1987) *citing* Erznoznik v. City of Jacksonville, 422 U.S. 205, 205 n. 3 (1975)

Judge Thompson indicated *sua sponte* there was no evidence that the statute or ordinance were vague on its face or as applied. Opinion, February 22, 1999. However, the record was packed with evidence the statute and ordinance were vague. For example, Bernards Township forced landowner to connect to the Township sewers by unlawful means. Complaint at 29 to 34. The power imposed upon the plaintiff's property was arbitrary, unnecessary, unfair and unreasonable. The sewer connection requirement was an unreasonable burden. For example: The Township should have but failed to run the sewer line far enough down the street to properly connect landowner's home. The Authority failed to properly supervise the attempted installation of the sewer "lateral" at a second alternative location. This resulted in the rupture of an "unmarked" gas main directly bordering the front of the house. A proper connection to the third and eventual location of the installation of the sewer lateral required the moving of a heating oil tank and other extraordinary property damage. There is no rational basis for requiring the landowner to connect to the sewers. Moreover, the basis for requiring plaintiff to connect to the town system was to reimburse a private builder. There is no constitutional public policy requiring landowner to connect to the Township sewers. For example, Bernards Township is still allowing new homes to be built in the township with septic systems so there apparently there is no public health issues.. Moreover, plaintiff's land is over 6 acres, clearly enough for an operational septic system. The Township's demands were cost

prohibitive and an undue and unreasonable burden on landowner. Bernards Township, with full knowledge of these hardships, including extreme inclement cold weather, maliciously issued a summons, thereby jeopardizing plaintiff's house and property. Moreover, enforcement of the law is unconstitutionally arbitrary. For example, landowner previously contracted to purchase other property in a different section of Bernards Township. (Under New Jersey law, a contract is a property right.) After the contract review period, it was determined that the septic system was failed. Mr. Felter, Senior Sanitarian Bernards Township, was notified of the septic system failure. Mr. Felter then identified the party who had violated the law by installing that failed septic system. The purchase could not be consummated until repairs to the failed septic system were made. However, instead of enforcing the law, with full knowledge of that violation, Mr. Felter threatened Mr. Barth by stating that he would condemn that other property if Mr. Barth pursued the matter. Plaintiff rescinded that contract under coercion by Mr. Felter. The power usurped upon the landowner is arbitrary, interferes with the fundamental rights of the landowner, and is repugnant to the Federal and N.J. Constitutions. Moreover, subsequent to the filing of the Complaint, through an Order to Show cause, plaintiff showed where the Township and Board of Health were permitting the construction of over a football size septic field on property within 200 feet of plaintiffs. Clearly under Counts 22 and 23, N.J.S.A. 26:3-31(d) (Sewer Connection) and the Bernards Township Board of Health Ordinance BH:13-2.2 are unconstitutionally vague and accordingly are unconstitutional under 42 U.S.C. § 1983, the Fifth and Fourteenth Amendments and the New Jersey Constitution.

Under Counts 12 through 21, the Bernards Township Tax Sale and New Jersey Statutes N.J.S.A. 54:5-19 and N.J.S.A. 40:14A-21 violate rights protected by Fifth and Fourteenth Amendments of U.S. Constitution and Art. I of the N.J. Constitution. No defendant defended its constitutionality. Peggy L. Warren, Certified Tax Collector, advertised in the Courier News that The Township of Bernards will sell plaintiff's property at a Tax Sale on April 30, 1997 at 11:00 a.m. Ms. Warren indicates the Sale is pursuant to N.J.S.A. 54:5-19 and N.J.S.A 40:14A-21. By certified mail, the property owner disputed the amount claimed owed. Bernards Township never

replied in writing to the dispute or provided an opportunity to be heard. Complaint paragraph 26. Therefore the Bernards Township Tax Sale violates plaintiff's rights protected by Fifth and Fourteenth Amendments of U.S. Constitution and Article I of the N.J. Constitution.. Accordingly, the Bernards Township Tax Sale of plaintiff's property scheduled for April 30, 1997 and New Jersey Statutes N.J.S.A. 54:5-19 and N.J.S.A. 40:14A-21 was unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution and Article I of the New Jersey Constitution. Judge Thompson refused to issue an order to show cause on this matter. Her dismissal of these counts were reversible error.

Under Counts 51 through 53, the N.J. Eminent Domain Statute N.J.S.A. 20 *et. seq* is Unconstitutional and Violates Property Rights Protected by the Fifth and Fourteenth Amendments. On March 27, 1997, PSE&G has filed suit in Superior Court, New Jersey, to exercise Eminent Domain over plaintiff's property. Public Service Electric and Gas Company v. Barth, *et. als.* SOM-L-549-97. Complaint paragraph 58. Landowner has a constitutionally protected right in his property. Id at 59. The condemnation filed by PSE&G effects that property right. Plaintiff had to obtain a variance to subdivide the property because of the land PSE&G sought to condemn. Id. at 60. As a matter of law, if a variance is required, the taking is as if the variance would not be granted. This is regardless of whether or not a variance is granted. Once a taking is effected, Landowner is required to expend additional sums of money for engineering and other costs for the purpose of acquiring a subdivision. Id. at 61.

It is clear New Jersey does not have adequate procedures for eminent domain. For example, New Jersey and Federal Court's recognize the right to be heard in one proceeding. However, the N.J. eminent Domain Statute does not provide the opportunity to be heard in one forum. Id. at 63. The New Jersey Office of Administrative Law indicated its jurisdiction is limited to that portion of PSE&G's original petition related to the eminent domain statute. Id. at 64. The OAL indicated it does not have jurisdiction to hear any of landowner's Federal or state claims or counter-claims. (This included violation of

the Federal Natural Gas Pipeline Safety Act.) There was no forum where all claims arising out of the same transaction can be heard. As a result, the landowner is subject to at least three (3) separate trials to resolve all claims arising out of a common nucleus of operative facts. The OAL process scatters all the claims so there is not coherent policy. *See also* Freehold v. Bd. Regulatory Comm., (CA 3 94-5168, January 9, 1995 *citing* Burford, (citation omitted) (no abstention because administrative procedures expensive, delayed, and uncertain) Moreover, by PSE&G's admission, the eminent domain proceedings are unconstitutional. For example: As shown in plaintiff's memo dated September 11, 1998 (supporting plaintiff's motion for injunctive relief returnable October 19, 1998), PSE&G admit they can attempt to condemn an inadequate parcel of land even if they made a mistake in the title search as to the bounds of the public right of way.

Furthermore, Judge Thompson admitted plaintiff has numerous Takings claims against Bernards Township. According to defendants, plaintiff should exhaust administrative remedies and at the same time suggest the claims are precluded by preclusion. It is clear by Judge Thompson's analysis that the N.J. Eminent Domain N.J.S.A. 20 *et. seq* is unconstitutional and violates landowner's Constitutional rights as protected by the Fourteenth and Fifth Amendments of the United States Constitution.

Thompson admitted no defendant defended the claim and committed reversible error when it *sua sponte* dismissed without notice Counts 64 through 67, that the Bernards Township Sewer Tax is Unconstitutional and violates Uniformity Clauses of Article 8 of the N.J. Constitution, Article I of the U.S. Constitution, and the Due Process Clause of the Fifth Amendment. Opinion, February 22, 1998, pages 21 - 22. Moreover, Judge Thompson misapprehends sewer taxes. Judge Thompson does not dispute that the sewer connection requirement infringed on landowners federal rights. Complaint paragraph 46. She does not dispute that there is no rational basis for the collection of the Sewer Tax and that it is an unreasonable and arbitrary imposition. She does not dispute that the collection of the tax is irrational and arbitrary since the same township can force someone to connect or disconnect to and from the sewers. She does not dispute that the Sewer authority claims it does not have to

indemnify homeowners from back-ups. She does not dispute that the tax is not uniform in the Township, the County or the State of New Jersey. Yet she misapprehends the basis for sewer taxes. It is undisputed that not all citizens in Bernards Township have to pay sewer taxes. Not all properties in Bernards Township have to be connected. That is, they do not have to pay one penny of sewer taxes. Accordingly, the requirements for the enforcement of the sewer tax are arbitrary and unconstitutional under the Uniformity Clauses of Article 8 of the N.J. Constitution, Article I of the United States Constitution, and the Due Process Clause of the Fifth and Fourteenth Amendment.

POINT X The Supreme Court ruled Property Ownership is a fundamental property right in cases such as Loretto v. Teleporter, 458 U.S. 419, (1982) that gives standing under 42 U.S.C. § 1985

Judge Thompson misapprehended 42 U.S.C. § 1985 as it applied to Bernards Township, the Bernards Township Board of Health, the Bernards Township Sewerage Authority, J. Knox Felter, Jr., and Barbara J. Pence liability for violating plaintiff's rights protected by 42 U.S.C. § 1985 (Civil Rights). Opinion February 28, 1998. Judge Thompson ruled plaintiff did not have standing to sue. However, Section 1985 applies to the deprivation of fundamental protected rights such as property ownership regardless of class or race and due process and equal protection. As shown in the undisputed RICO count, defendants conspired, acted in furtherance of the conspiracy to deny plaintiff of property rights and equal protection and due process of law before both the Municipal court and federal district court. The Supreme Court ruled Property Ownership is a fundamental property right in cases such as Loretto v. Teleporter, 458 U.S. 419, (1982). Accordingly, plaintiff had standing to sue under 42 U.S.C. § 1985.

POINT XI Plaintiff had standing to sue under 42 U.S.C. § 4001 where NJ DEP and testimony before Bernards Township Planning Board indicated Bernards Township increased flooding in a flood zone adjacent to plaintiff's property.

The NJ DEP acknowledged in its report that a Bernards Township road re-grading project created additional flooding on the plaintiff's

property. Complaint paragraph 18. Defendants Bernards Township and Mr. Messina, Township Engineer, do not dispute they did not obtain the proper permits for the re-grading project. Reply brief page 5. The purpose of the federal law is to stop flooding. 42 U.S.C. § 4001. Moreover, N.J.S.A. 2A:35A-4, 10 expressly provides for a private right of action under all federal and state environmental related statues, including those environmental claims related to the effects of flooding. *See also* National Environmental Policy Act (NEPA) and Administrative Procedure Act (citations omitted). Accordingly plaintiff properly brought a private cause of action under these acts. Moreover, the Bernards Township Planning Board approved a site plan for property within 200 feet of plaintiff's property based on testimony from the planner's testimony before the Board that the plans would raise the flood level. (The Township also approved the construction of a mammoth septic system yet previously sued plaintiff for having a system for a single-unit home. Judge Thompson erred in refusing to issue the order to show cause why that proceeding before the planning Board should not be stayed.). Accordingly, plaintiff had standing to sue under Counts 5 and 6, Bernards Township and Mr. Messina, Township Engineer as liable for violating 42 U.S.C. § 4001 and the N.J. Flood Hazard Area Control Act 58:16A-50.

POINT XII District Court Erred in Dismissing Federal Constitutional or 42 U.S.C. § 1983 Statutory Claims without reason in opposite to Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979)

Under Counts 1 through 4, Bernards Township and Mr. Messina, Township Engineer are liable for violating plaintiff's rights: protected by the Fifth Amendment of the United States Constitution; protected under the Fourteenth Amendment of the United States Constitution; protected under 42 U.S.C. § 1983; and protected by the New Jersey Constitution. Judge Thompson's analysis is unclear on these Constitutional questions. In addition, she never addressed the count under 42 U.S.C. § 1983. *See also* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency 440 U.S. 391 (1979) (Local entity liable for land use regulations or decision that cause an unlawful deprivation of rights.). Judge Thompson also incorrectly dismissed

sua sponte without notice Counts 1 and 4 against defendant Messina. Judge Thompson indicated plaintiff must avail the New Jersey procedures for seeking compensation under the Fifth Amendment and the New Jersey Constitution. Opinion February 28, 1999. Judge Thompson arbitrarily applied a Fourteenth Amendment equal protection test where she suggested plaintiff lacked any fundamental constitutional right or showed Bernards Township lacked a rational basis for its action. *Id.* Judge Thompson misapprehended constitutional law. For example, Mr. Barth has a fundamental protected constitutional property right in property located at Block 133 Lot 4, located in Bernards Township, Somerset County New Jersey. In addition, Bernards Township admitted it had no recorded right of way and was in effect constructing a new road on plaintiff's property. Accordingly, defendants' had to show a compelling state interest for the actions it took. They never did and accordingly their request must be denied. Moreover, they constructed a road that caused flooding in violation of a federal statute. There is no rational basis for the defendants' actions. Judge Thompson also over-reacted to the relief being sought. Plaintiff also sought injunctive relief. *See e.g.,* Complaint Relief paragraph. Without the injunctive relief, Plaintiff is forced to pay for construction in addition to the amount resulting from the taking. For example, to lower the flood plain, for approximately $15M, plaintiff could purchase adjacent land from a Church who is looking to sell their property and build a retention basis. In addition, most of the under-ground flooding had been temporarily stopped as a result of the Bernards Township sewage system acting as a sort of a "sump pump."

POINT XIII Since 1983 plaintiff is never required to exhaust state remedies under Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); Mathews v. Eldridge, 424 U.S. 319 (1976); based on the District Court ruling, the NJ Entire Controversy Doctrine is unconstitutional and the notice provision of NJ Tort claim Act do not apply.

By the Bernards Township Inverse Condemnation Defendants own admission the Claims against them should not have been dismissed with summary judgment but that summary judgment should have been entered against them. The exhaustion doctrine ordinarily has the

effect of delaying judicial review when the court orders a party to attempt to obtain relief from some place first. (Citation omitted.) This does not result in summary judgment. Moreover, defendants admit the District Court had jurisdiction under 42 U.S.C. section 1983. The Supreme Court previously held that a section 1983 plaintiff is never required to exhaust state remedies, no matter how adequate or easily exhausted those remedies might be. Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); Mathews v. Eldridge, 424 U.S. 319 (1976).

Defendants suggest if there is an excuse for failure to exhaust any state remedies that the court take up the substantive issues. However, by their own admission that they do not dispute the material facts in the complaint they admit summary judgment should have been entered against themselves. They admitted by affidavit that they did install pipes on Mr. Barth's property outside what even they perceived as the Township right of way. Defendants admit a multiple of claims that if each claim had to be pursued individually shows the burdensome of the procedures and the unconstitutionality of the eminent domain acts. They suggest that a person may bring an inverse condemnation action in state court. This clearly does not preclude that a person may bring an inverse condemnation action in federal court. Moreover, appellant seeks more than just compensation. Appellant seeks other relief including fixing the root causes of the problem. For example, by the township own admissions these problems can be remedied. As stated, opposing counsel did not provide appellant with information related to the expert they hired.) Moreover, Kevin Paige, an Engineer testifying before the Bernards Township Planning Board indicated on August 3, 1999 that the Township had two separate and different plans depicting its storm water management plans. That Engineer testified that the two different plans showed varying heights of flood plains. Opposing counsel apparently withheld this information. Mr. Belardo admits his client raised the flooding of water approximately 1 foot. The purpose of the National Flood Insurance Program is to prohibit flooding. It is for a jury to determine the deprivation of appellant's rights. Accordingly summary judgment should be entered against the Bernards Township Inverse Condemnation defendants.

Under Count 68, Bernards Township, the Bernards Township Board of Health, the Bernards Township Sewerage Authority, J. Knox Felter, Jr., Barbara J. Pence, are liable for violating the N.J. Tort Claims Act N.J.S.A. 59:1-1 *et seq*. Judge Thompson misapprehended this law by dismissing for lack of Notice. Opinion February 22, 1998. For example, they are estopped from raising the defense by participating in discovery. Marley v. Palmyra, 139 N.J. super. 271 (L. 1983). They are estopped from raising the defense as they show no prejudice. Anske v. Borough of Palisades Park, 139 N.J. Super. 342 (1976). The defendants waive the defense by failure to plead earlier. Hill v. board of Ed. of Middleton Tp . 183 N.J. Super. 36 (A.D. 1982) (Default was entered against Bernards Township Sewage Authority on August 22, 1997.) They have no immunity under civil rights actions. Lloyd v. Stone Harbor, 149 N.J. Super. 496, 517 (Ch. Div. 1981). Under the Entire Controversy Doctrine, the Tort Claims Act is not a bar in that defendants first sued plaintiff. Guerro v. City of Newark, 216 N.J. Super. 66 (A.D. 1987). Moreover, the Supreme Court previously held that a section 1983 plaintiff is never required to exhaust state remedies, no matter how adequate or easily exhausted those remedies might be. Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); Mathews v. Eldridge, 424 U.S. 319 (1976). Judge Thompson also misapprehended the law as it relates to motions for leave to file a late notice of claim. Opinion February 22, 1998. Defendants received constructive notice of the claims. N.J.S.A. 59:4-3. No defendants and Judge Thompson did not dispute federal jurisdiction over the Tort Claim Act. It is reversible error to suggest a federal court with jurisdiction over the act does not have jurisdiction over that portion of the act relating to filing late notices. In addition, any dismissal of such a complaint is without prejudice. Guerro v. City of Newark, 216 N.J. Super. 66 (A.D. 1987).

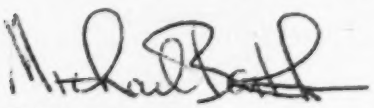
The only conclusions that can be drawn related to the New Jersey Tort Claim Act is that the Notice Provisions are Unconstitutional. Defendants do not deny the Tort Claim Act can be brought in federal district court. They suggest that only a New Jersey State Superior Court judge can extend the time to file what they perceive as a late "notice of claim" and satisfy the requirements for the same claim in federal district court. The minimum extension period would have to be the same as the statute of limitation for both federal and state court

judges. Clearly defendants received notice of the Tort Claims whether actual or constructive. In a separate incident, the Township corrected a condition by cementing the bottom of a particular storm basin adjacent to plaintiff's property. If the defendants had not sued plaintiff perhaps more of the issues could have been resolved out of court. For example, the Township appears to be looking at ways to alleviate some of the flooding in the town. However, that does not preclude plaintiff from suing in the instant case under the New Jersey Entire Controversy Doctrine. Moreover, as stated in appellant's letter-memorandum to the court on July 9, 1999, whether the defendants ever mentioned a defense to the Tort Claim was not the sole issue below but more that as a matter of law in that the defendants defaulted they waived a waivable Rule 12 defense and that they subsequently waited too long to bring a motion to dismiss on the defense and accordingly as a matter of law the defense did not apply.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that a writ of certiorari issue to review the judgment below in the Third Circuit Court of Appeals in Barth v. PSE&G et al: Order filed September 28, 1999 affirming District Court Order filed February 22, 1999 CA 3 Docket 99-5190; Denial of Petition for Rehearing in CA3 Dockets 97-5368 & 98-5059; and Court of Appeals' order affirming district court order entered May 7, 1997 (denial of order to show cause for a preliminary injunction) and June 18, 1997 (denial of stay of state court proceedings and reassignment to Newark).

Respectfully submitted,



Michael Barth
December 15, 1999

(2)
Supreme Court, U.S.
FILED

991098 DEC 27 1999

OFFICE OF THE CLERK

No. _____

IN THE
SUPRME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

MICHAEL BARTH,

PETITIONER,

v.

PUBLIC SERVICE ELECTRIC AND GAS; TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY; BERNARDS TOWNSHIP BOARD OF HEALTH; BERNARDS TOWNSHIP MUNICIPAL COURT; J. KNOX FELTER, JR., Senior Sanitarian, Bernards Township; PETER A. MESSINA, P.E., P.P. Township Engineer/Planner; PEGGY WARREN, Certified Tax Collector, Bernards Township; BARBARA J. PENCE, Township Administrator; J. DOE(S), individually and in their official capacities; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS, and various New Jersey State Statutes; A.D. RUNYON OIL COMPANY; HARRY P. BELDON, Attorney at Law,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
PETITION FOR WRIT OF CERTIORARI

APPENDIX FOR PETITIONER

Michael Barth
P.O. Box 315
Liberty Corner, New Jersey 07938

83pp

UNREPORTED – NOT PRECEDENTAL
IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 99-5190

MICHAEL BARTH, APPELLANT,

V.

PUBLIC SERVICE ELECTRIC AND GAS; TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY; BERNARDS TOWNSHIP BOARD OF HEALTH; BERNARDS TOWNSHIP MUNICIPAL COURT; J. KNOX FELTER, JR., Senior Sanitarian, Bernards Township; PETER A. MESSINA, P.E., P.P. Township Engineer/Planner; PEGGY WARREN, Certified Tax Collector, Bernards Township; BARBARA J. PENCE, Township Administrator; J. DOE(S), individually and in their official capacities; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS, and various New Jersey State Statutes; A.D. RUNYON OIL COMPANY; HARRY P. BELDON, Attorney at Law

On Appeal From the United States District Court For the District of New Jersey (D.C. Civ. No. 97-cv-02163) District Judge: Honorable Anne E. Thompson, Chief Judge

Submitted Under Third Circuit LAR 34. 1 (a) September 8, 1999--

Before: MANSMANN, RENDELL AND STAPLETON, CIRCUIT JUDGES (Filed September 28, 1999)

OPINION

PER CURIAM

Michael Barth appeals from the District Court's order granting the defendants' motions for summary judgment and other motions and denying Barth's motions. We shall affirm the District Court's order.

In April 1997 Barth filed a complaint alleging numerous violations of various rights under federal and state law. According to Barth, the Township regraded the road bordering part of his property, creating a dam which causes flooding during "extreme heavy rains." He alleges that flooding is also caused by the installation of storm sewers on his property. Barth contends that this constitutes wrongful taking of his property in violation of the United States Constitution, amounts to trespass, creates a nuisance, and violates the New Jersey Flood Hazard Area Control Act. Barth also complains that after he requested the New Jersey Department of Environmental Protection to investigate regrading of the road, the agency refused to give him a copy of their file report on the matter in violation of his right to know under state law.

Next, Barth complains that the Township unlawfully forced him to connect to the Township's sewers and that the placement of a connecting pipe in the wrong location resulted in the rupture of an unmarked gas main. He insists that there is no rational basis for requiring him to connect to the sewers - new homes are built in the Township with septic systems and his property is large enough to accommodate one - and that the statute concerning sewer connection and the Township's Board of Health Ordinance are unconstitutionally vague. He also complains that a summons was wrongfully issued against him for failing to connect to the sewer system in a timely fashion, and that he was forced to connect to the sewer system because of illegalities during the municipal proceedings, including *ex parte* conversations in open court between the municipal judge, the prosecutor, the Township's sanitarian and the Township's administrator. Barth complains that the court refused to provide him with a complete copy of a tape recording of the proceedings. Barth also alleges that there is no rational basis for collection of the Sewer Tax, which is "irrational and arbitrary since the same township can force someone to connect or disconnect to and from the sewers," complaint at ¶46, and not uniform.

Next, Barth alleges that PSE&G contractors installed a temporary gas line adjacent to a corner of his property in violation of minimum federal safety standards issued by the U.S. Department of

Transportation, thereby creating a public safety hazard in violation of federal and state law. He also claims that PSE&G has sought a utility easement into his property pursuant to the New Jersey Eminent Domain statute which is, he insists, unconstitutional, that PSE&G subcontractors have trespassed on his property, damaging or destroying trees in the process, and that PSE&G has refused in bad faith to settle his claim regarding this damage.

Next, Barth complains that the New Jersey Department of Environmental Protection has inconsistently ruled on different occasions that certain wetlands on his property are of minimal resource value while other wetlands on his property have exceptional resource value, and that this indicates the arbitrary and capricious conduct of the Department and that the statutes concerned are unconstitutional.

Next, Barth complains that Runyon Company has brought a frivolous lawsuit against him arising out of their filling his oil tank even though he requested delivery of only 100 gallons of oil, and that their filling the tank somehow interfered with the connection of his property to the sewer lines.

Barth also alleges that the Tax Sale of his property scheduled for April 1997 violates his rights to due process because he was denied an opportunity to be heard. Finally, he alleges that the New Jersey Entire Controversy Doctrine is unconstitutional. He seeks a declaratory judgment, injunctive relief, compensatory, punitive and exemplary damages in the amount of at least forty seven and a quarter million dollars.

The District Court found all of Barth's claims meritless. Addressing his claims against PSE&G, the Court found that federal and state law-allows suits concerning action, and that even if they were, Barth has failed in his opposition to PSE&G's motion for summary action to set forth any actual evidence creating a genuine issue of material fact. Nor is there merit to his complaint that the New Jersey eminent domain statute violates his rights under the Fifth and Fourteenth

Amendments; New Jersey has adequate procedures for seeking just compensation. The Court found that his remaining claims against PSE&G are barred by the *res judicata* effect of PSE&G's condemnation proceeding against Barth in state court; even if they were not so barred, they are meritless.

Turning to Barth's claims against the Township defendants, the Court found that his condemnation claims are barred for failure to exhaust state remedies. The Court found his equal protection claims meritless because he neither alleges improper use of a suspect classification nor the infringement of a fundamental constitutional right, and does not allege that the Township's regrading the road lacked a rational basis. Nor is there evidence that the defendants' decision requiring Barth to connect to the sewer lacked a rational basis. The Court also found his due process claims with regard to the regrading, sewer connection, and tax sale, meritless because New Jersey has adequate procedures for seeking just compensation and appealing tax decisions, and because the decisions in question were not arbitrary and capricious. As for Barth's statutory claims, neither the New Jersey Flood Hazard Control Act nor the National Flood Insurance Act creates a private cause of action of the sort Barth seeks to pursue, while his claim that he has been denied a transcript of the municipal court transcript has been rendered moot by the Township's providing him with a copy. The District Court found his section 1985 claim meritless because he has not alleged an invidiously racial or class-based discriminatory intent, and his RICO claims meritless because he has not alleged a pattern of racketeering activity as defined by 18 U.S.C. § 1962. Finally, the Court found that Barth's tort claims against the Township defendants failed because he failed to comply with the procedures prescribed by the New Jersey Tort Claims Act.

Turning to Barth's claims against the Department of Environmental Protection, the District Court found that his right to know claim was rendered moot when the Department gave him a copy of the regrading report and that the Department is immune from his other claims under the Eleventh Amendment. The Court found no evidence that the New Jersey Freshwater Wetlands Protection Act and its regulations are unconstitutionally vague on their face or as applied.

Next, the Court found no merit to Barth's claims with regard to the sewer tax because he provides no evidence that the tax is not uniform, ie., not assessed according to the value of the property. The Court found his claim that the tax violates his due process rights meritless because there are adequate remedies for challenging tax assessments under state law. Finally, the Court found no merit to Barth's contention that the entire controversy doctrine is unconstitutional and denied his motions.

III

After careful review of the record and the parties' briefs, we agree with the District Court that Barth's complaint is meritless and shall affirm that court's judgment for essentially the same reasons as those provided in its exhaustive opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 99-5190

MICHAEL BARTH, Appellant
V.
PUBLIC SERVICE ELECTRIC AND GAS; TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY; BERNARDS TOWNSHIP BOARD OF HEALTH; BERNARDS TOWNSHIP MUNICIPAL COURT; J. KNOX FELTER, JR., Senior Sanitarian, Bernards Township; PETER A. MESSINA, P.E., P.P. Township Engineer/Planner; PEGGY WARREN, Certified Tax Collector, Bernards Township; BARBARA J. PENCE, Township Administrator; J. DOE(S), individually and in their official capacities; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS, and various New Jersey State Statutes; A.D. RUNYON OIL COMPANY; HARRY P. BELDON, Attorney at Law

On Appeal From the United States District Court For the District of New Jersey (D.C. Civ. No. 97-cv-02163) District Judge: Honorable Anne E. Thompson, Chief Judge

Submitted Under Third Circuit LAR 34. 1 (a) - September 8, 1999
Before: MANSNIANN, RENDELL AND STAPLETON, CIRCUIT-JUDGES

JUDGMENT

This case came on to be heard on the record from the United States District Court for the District of 'New Jersey and was submitted pursuant to Third Circuit LAR 34. 1 (a). On consideration whereof, it is now here ORDERED AND AFFIRMED by this Court that the judgment of the District Court entered February 22, 1999, be and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST CLERK

DATED: September 28,1999

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 97-5368

MICHAEL BARTH, APPELLANT

vs.

PUBLIC SERVICE ELECTRIC & GAS; TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY; BERNARDS TOWNSHIP BOARD OF HEALTH; BERNARDS TOWNSHIP MUNICIPAL COURT; J. KNOX FELTER, JR., SENIOR SANITARIAN, BERNARDS TOWNSHIP; PETER A. MESSINA, P.E., P.P. TOWNSHIP ENGINEER/PLANNER; PEGGY WARREN, CERTIFIED TAX COLLECTOR, BERNARDS TOWNSHIP, BARBARA J. PENCE, TOWNSHIP ADMINISTRATOR; J. DOE(S), individually and in their official capacity; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS; A.D. RUNYON OIL COMPANY; HARRY P. BELDON, ATTORNEY AT -LAW

No. 98-5059

MICHAEL BARTH, APPELLANT

vs

PUBLIC SERVICE ELECTRIC & GAS; TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY; BERNARDS TOWNSHIP BOARD OF HEALTH; BERNARDS TOWNSHIP MUNICIPAL COURT; J. KNOX FELTER, JR., SENIOR SANITARIAN, BERNARDS TOVY'NSHIP; PETER A. MESSINA, P.E., P.P. TOWNSHIP ENGINEER/PLANNER; PEGGY WARREN, CERTIFIED TAX COLLECTOR, BERNARDS TOWNSHIP; BARBARA J. PENCE, TOWNSHIP ADMINISTRATOR; J. DOE(S), individually and in their official capacity; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND ITS COMMISSIONERS; and various New Jersey State Statutes; A.D. RUNYON OIL COMPANY; HARRY P. BELDON, ATTORNEY AT LAW

Appeal from the United States District Court for the District of New Jersey (D.C. Civil No. 97-cv-02163) District Judge: Honorable Anne E. Thompson

Submitted Under Third Circuit LAR 34. l(a) Monday, April 27, 1998

BEFORE: ALITO, RENDELL and GARTH, Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is: ADJUDGED AND ORDERED that the judgments of the district court entered May 7, 1997 (denial of order to show cause for a preliminary injunction) and June 18, 1997 (denial of stay of state court proceedings and reassignment to Newark), be and are hereby affirmed.

Each party will pay its own costs.

By the Court
signed
Circuit Judge

ATTEST
SIGNED
P. Douglas Sisk, Clerk
DATED: MAY - 4 1998

Certified as a true copy and issued in lieu of a formal mandate on January 13, 1999.

Teste: *signed* Clerk, United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

February 12, 1998 C-72

Nos. 97-5368 & 98-5059

MICHAEL BARTH, Appellant
VS.
PUBLIC SERVICE ELECTRIC & GAS, et al.
(District Of NJ (Trenton) D.C. Civil No. 97-cv-02163)(AET)
Present: SLOVITER AND MASMA.NN, Circuit Judges.

(1) Motion by Appellant, Michael Barth, to stay the decision below pending appeal.

Copy of Clerk's orders dated 2/12/98 sent for information of the Court.

Laura L. Davis 597-5017 Case manager

ORDER

The foregoing *motion to stay is denied*

By the Court,
Signed
Circuit Judge

Dated- FEB 20, 1998

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 97 - 5368

MICHAEL BARTH, Appellant
vs.
PUBLIC SERVICE ELECTRIC & Gas, et al.
(District of NJ (Trenton) D.C. Civil No (97-cv-02163)(AET)

Present: ALITO, LEWIS, AND RENDELL, Circuit Judges.

(1) Motion by Appellant, Michael Earth, for disqualification of the Honorable Anne E. Thompson or transfer of the case.

(2) Letter dated August 26, 1997 by Appellant, Michael Barth, which shall be construed as a motion for injunctive relief.

Copy of Clerk's orders dated 8/20/97 & 9/2/97 sent for the Court's information

SIGNED
Laura L. Davis/MCW
Case Manager

Listed for disposition on the merits for 4/27/98. 0 R D E R

The foregoing is denied

By the court,
signed
Circuit Judge

Dated - JAN 1 3 1999

A10

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

MICHAEL BARTH,

Plaintiff,

V.

Civil No. 97-2163 (AET)

OPINION

PUBLIC SERVICE ELECTRIC AND GAS, et al.,
Defendants.

ANNE E. THOMPSON, Chief Judge

This matter is before the Court on a number of motions. Plaintiff Michael Barth ("plaintiff") filed motions to strike defendants' answers, to find defendants in contempt, to enter default, for costs and fees, to extend time for discovery, and for leave to file an amended complaint. Defendant Public Service Electric and Gas ("PSE&G") filed a motion for summary judgment. Defendants State of New Jersey, Department of Environmental Protection ("DEP") and its Commissioner ("State defendants") filed a cross-motion to quash plaintiff's interrogatories and a motion for judgment on the pleadings. Defendants Township of Bernards, Bernards Township Sewage Authority, Bernards Township Board of Health, Bernards Township Municipal Court, J. Knox Felter, Jr., Peter A. Messina, P.E., P.P., Peggy Warren, and Barbara J. Pence ("Township defendants") filed separate motions for summary judgment on plaintiff's condemnation claim and on plaintiff s compensatory non-inverse condemnation claims.

The Court has reviewed the parties' submissions and has decided the motions without oral argument pursuant to FED. R. Civ. P. 78. For the following reasons, plaintiff s motions are denied, and the State

defendant's cross-motion to quash plaintiff's interrogatories is therefore dismissed as moot. PSE&G's motion for summary judgment is granted, the Township defendants' motion for summary judgment is granted, and the State defendants' motion for judgment on the pleadings is granted.

BACKGROUND

A. The Complaint

On April 17, 1997, plaintiff filed a complaint against defendants alleging a number of federal and state constitutional and statutory violations, as well as violations of rights grounded in the common law. For the most part, plaintiff s seventy-five count complaint is haphazard, spare, and makes legal assertions without factual support. Following is the Court's attempt to organize plaintiff s allegations, according to incident, so that the complaint may be evaluated.

1. Re-Grading

Plaintiff alleges that defendants Bernards Township and Peter A. Messina, Township Engineer, re-graded the road bordering his property, thereby raising the elevation of the road and causing flooding on his property. Moreover, plaintiff alleges that he requested a review of the re- grading by defendant DEP and that defendant DEP has repeatedly refused to hand over its report.

2. Tax Sale

Plaintiff alleges that defendant Bernards Township through defendant Peggy L. Warren, Township Tax Collector, advertised the sale of a property owned by plaintiff at an April 30, 1997 tax sale. It is not clear whether the sale ever took place. Plaintiff alleges that he was given no opportunity to be heard on the issue of how much he owed the Township.

3. Sewer Line

Plaintiff alleges that defendants Bernards Township, Bernards Township Sewerage Authority, Bernards Township Board of Health, -and J. Knox Felter, Jr., Township Senior Sanitarian, forced plaintiff "to connect to the Township sewers by unlawful means." Plaintiff alleges that defendants Bernards Township, Bernards Township Sewerage Authority, and Bernards Township Board of Health through defendant J. Knox Felter, Jr., wrongfully filed suit in Municipal Court to compel plaintiff to connect to the sewer, thereby interfering with his "possession and enjoyment possession and enjoyment of property." Plaintiff also alleges that, during the municipal court action, the presiding municipal court judge held ex parte side-bar conversations with the prosecutor and defendants J. Knox Felter, Jr. and Barbara J. Pence, Township Administrator. Plaintiff alleges that defendant Bernards Township Municipal Court has refused to provide plaintiff with transcripts of such ex parte conversations.

4 "Temporary Gas Line"

Plaintiff alleges that, on or about August 3, 1993, defendant PSF,&G "installed a 'temporary gas line' on the street over the bridge adjacent to the southwest comer of plaintiff's property." Plaintiff alleges that defendant PSE&G constructed the "temporary gas line" by laying the line on the deck of the bridge and paving over it without other protection. In connection with this or some related activity, plaintiff alleges that he entered a June 28, 1993 contract with defendant PSE&G wherein PSE&G promised to reimburse and indemnify plaintiff for property damage. Plaintiff alleges that, during the summer of 1993 and in December 1993, PSE&G brought vehicles, machines and other equipment onto plaintiff s property and caused damage to trees growing thereon. Plaintiff alleges that he filed a claim with PSE&G for reimbursement and that PSE&G refused to pay.

PSE&G contends that, starting in 1993, it began negotiations with plaintiff to purchase a 10 x 40 foot parcel of plaintiff's property to run a gas distribution pipeline. When PSE&G was unable to reach an agreement with plaintiff, it complied with New Jersey's statutory and regulatory requirements governing condemnation to obtain an easement. By Order dated September 11, 1997, the Honorable Wilfred P. Diana, of the Superior Court of New Jersey, Somerset

County entered judgment for PSE&G. Plaintiffs appeal is apparently pending.

5. Wetlands Classification

Plaintiff alleges that, based upon its ruling that the wetlands on plaintiff s property were of "the most minimal resource value," defendant DEP granted defendant PSE&G a stream encroachment permit for a portion of plaintiff's property. In reliance on this "most minimal" classification, plaintiff alleges that he obtained planning board approval for raising and keeping horses on his property, subdivided the property, and constructed a large corral, all at great expense. However, according to plaintiff, subsequent to its initial ruling, the DEP reclassified some of the wetlands on plaintiff's property as being of "exceptional value" and required plaintiff to obtain a formal delineation of the wetlands on his property.

II DISCUSSION

(a) Defendants' Motions

1. Motions for Summary Judgment

a. Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See FED. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party satisfies this initial burden, the opposing party must establish that a genuine issue exists. See Jersey Cent. Power & Light Co. v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir. 1985), cert. denied, 475 U.S. 1013 (1986). Issues of fact are genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The opposing party cannot rest upon mere allegations, but must present actual evidence that creates a genuine issue of material fact. See id. at 249 (citing First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290 (1968)). In turn, the court must draw all reasonable inferences in favor of the

opposing party and must accept that party's evidence. See Pollock v. American Tel. & Tel. Long Lines, 794 F.2d 860, 864 (3d Cir. 1986).

b. Application

i. PSE&G

Plaintiff alleges that defendant PSE&G violated his right under the federal and New Jersey Natural Gas Pipeline Safety Acts by constructing a "temporary gas line" contrary to federal regulation, breached its contract with and its duty of good faith to plaintiff by failing to reimburse plaintiff for the cost of damaged trees, and is liable for trespass, negligence and waste. It is PSE&G's position that, because it was awarded an easement on plaintiffs land and its use of plaintiff s property was limited to that easement, plaintiff s property deprivation claims are barred by the doctrines of res judicata and collateral estoppel. PSE&G further contends that the federal and state Natural Gas Pipeline Safety Acts do not apply to the installation of the gas line in this case and, even if they did, plaintiff has failed to set forth any competent evidence, i.e., an expert report, demonstrating that the installation did not meet requirements of those Acts.

Federal and New Jersey laws do require persons or entities transporting gas to comply with safety standards. See 49 U.S.C. § 60118(a)(1); N.J. STAT. ANN. 48:9-33. Federal law permits a private person to bring an action for injunctive relief to ensure compliance with such standards if the Secretary of Transportation or appropriate State authority fails to act after being given notice; it does not permit a private person to bring an action for damages other than costs and fees. See 49 U.S.C. § 60121. New Jersey law empowers the Board of Public Utilities to impose fines for lack of compliance with "any law, rule, regulation, or order relating to natural gas pipeline safety" and to bring an action for injunctive relief in the Superior Court of New Jersey; it does not permit a private person to bring an action for injunctive or compensatory relief See N.J. STAT. ANN. 48:9-33(c). Thus, plaintiff s compensatory claims against PSE&G are barred under both acts and his claim for injunctive relief is barred under the New Jersey act. Moreover, even if the Court assumes that plaintiff satisfied the procedural prerequisites for filing an action for

injunctive relief pursuant to 49 U.S.C. § 60121 and the appropriate governmental entity failed to act, plaintiff failed in his opposition to PSE&G's summary judgment motion to set forth any actual evidence that creates a genuine issue of material fact.

Plaintiff s remaining claims against PSE&G are barred by the doctrine of claim preclusion, also known as res judicata . "'Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have bee.. advanced in an earlier suit.'" Peduto v. City of No. Wildwood, 696 F. Supp. 1004, 1007 (D.N.J. 1988) (citations omitted) (quoting Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984)), aff d, 878 f 2d 725 (3d Cir. 1989). "While claim preclusion prohibits a second court to consider matters that should have been litigated but never were, it also serves to bar matters stemming from the same claim that have been litigated." Id. For claim preclusion to apply, the proponent must demonstrate an identity of causes of action, parties and issues and must prove that the prior judgment was valid, final, and on the merits. Id. at 1008

Plaintiff s instant complaint and the New Jersey Superior Court condemnation action involve identical causes of action, parties and issues. Plaintiff does not challenge the validity of Judge Diana's Order. See id. ("A Judgment is valid if the court entering it had the power to hear the case and bind the parties."). That judgment was final, See CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4433, at 308 (1981) ("The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of an appeal .....), and entered after a trial on the merits. , [1]

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[1] Even if the doctrine of claim preclusion did not apply, the Court is convinced that plaintiff s remaining claims against PSE&G are without merit. There is no indication that plaintiff filed a Notice of Claim, as required by the New Jersey Tort Claims Act, in support of his claims for trespass, negligence and waste. See N.J. STAT. ANN. 59:8-1 et seq.; Johnson v. Does, 950 F. Supp. 632, 634-35 (D.N.J. 1997) (holding that failure to comply with notice provisions mandates

Plaintiff s claims against PSE&G cannot withstand a motion for summary judgment.

ii. The Township Defendants

(A) Inverse condemnation claim

Plaintiff alleges that the Township defendants' actions in re-grading a road bordering his property constitute a taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, paragraph 20 of the New Jersey Constitution. The Township defendants contend that plaintiff s claim is barred for failure to exhaust state remedies.

The Fifth Amendment provides that no "private property [shall) be taken for public use, without just compensation." U.S. CONST., amend V. However, if a state provides an adequate procedure for seeking just compensation, a federal district court lacks subject matter jurisdiction over a Fifth Amendment takings claim until the plaintiff has utilized the state procedure and been denied just compensation. See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson Cily, 473 U.S. 172,194-95 (1985); Stern v. Halligan, 158 F.3d 729,734 (3d
Cir. 1998). New Jersey has an adequate procedure for seeking just compensation. See N.J. STAT. ANN. 20:3-1 et @iM.; Cuzzupe v. Paparone Realty Co., 596 F. Supp. 988, 990 (D.N.J. 1984) (finding that N.J. STAT. ANN. 20:3-1 et §M. "provides an adequate post-deprivation remedy") Because plaintiff did not avail himself of New Jersey's procedure for seeking just compensation, this Court lacks jurisdiction over plaintiff s Fifth Amendment takings claim.

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dismissal). While this omission does not require dismissal of his contract claims, see N.J. STAT. ANN. 59:1-4, plaintiff offers no evidence establishing a contract with PSE&G. Nor does he oppose PSE&G's contention that the 1993 negotiations between the plaintiff and PSE&G for the purchase of a 10 x 40 foot tract of plaintiff s land broke down and led to PSE&G's institution of condemnation proceedings.

Article 1, paragraph 20 of the New Jersey Constitution provides that "[p]rivate property shall not be taken for public use without just compensation." N.J. CONST., art. 1, par. 20. The New Jersey Eminent Domain Act of 1971 establishes the procedure whereby an aggrieved landowner may seek a post-deprivation remedy. See N.J. STAT. ANN. § 20:3-1 et iq_q.; Cuzzupe, 596 F. Supp. at 990. The Act vests jurisdiction for such condemnation proceedings in the Superior Court of New Jersey. See N.J. STAT. ANN. §§ 20:3-5, -2. That this Court does not have jurisdiction to conduct condemnation proceedings pursuant to N.J. STAT. ANN. § 20:3-1 et seq. is consonant with the exhaustion requirement for Fifth Amendment takings claims.

For the foregoing reasons, plaintiff s inverse condemnation claims against the Township Defendants cannot withstand a motion for summary judgment.

(B) Non-inverse condemnation claims

Plaintiff alleges that the Township defendants' actions in re-grading a road bordering his property violated his right to due process and equal protection pursuant to the Fourteenth Amendment of the United States Constitution, violates his right protected by the New Jersey Flood Hazard Control Act, and constitutes Trespassing and a nuisance. In respect of the sewer connection requirement, plaintiff alleges that such a requirement lacks a rational basis and is an undue burden on landowners, and that enforcement of the law is arbitrary. On this basis, plaintiff argues that the Township defendants' actions in forcing him to connect to the Township sewer system violated his rights under the Fifth and Fourteenth Amendment and Article 1, paragraph I of the New Jersey Constitution, constituted malicious prosecution, wrongful interference with plaintiff s property rights, fraud, malicious and tortious interference with a contractual relationship, abuse of process and negligence, violated the New Jersey Right to Know Law, and exposed the Township defendants to liability pursuant to 42 U.S.C. § 1985, 18 U.S.C. §§ 1961 et seq., and the New Jersey Tort Claims Act. Plaintiff also argues that N.J. STAT. ANN. 26:3-3 1 (d) and the corresponding township ordinance are unconstitutionally vague. The Township defendants contend that plaintiff s claims are without merit

and, further, that plaintiff s state law claims are barred for failure to file Notice of Claim pursuant to the New Jersey Tort Claims Act.

(1) Equal Protection

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." Article 1, paragraph I of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." "Although it does not mention equal protection, "Article 1 safeguards the same values encompassed by federal equal protection jurisprudence." Sanchez v. Department of Human Servs., 314 N.J. Super. 11, 30 (App. Div. 1998).

"Equal protection of the law simply requires that all persons similarly situated be dealt with alike." State v. Zapata, 297 N.J. Super. 160, 176 (App. Div. 1997), cert. denied, 156 N.J. 405 (1998). Thus, "[o]nly when a state 'adopts a rule that has a special impact on less than all persons subject to its jurisdiction' does a question arise as to whether the equal protection clause is violated." Alexander v. Whitman, 114 F.3d 1392,1407 (3d Cir. 1997) (quoting New York City Transit Auth. v. Beazer, 440 U.S. 568, 587-88 (1979)), cert. denied, 118 S. Ct. 367 (1997). However, equal protection "does not require that things which are different in fact be treated in law as though they are the same." Id. States are granted broad discretion to enact laws which may affect different citizens differently. Id. "'[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights [will] be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Id. (quoting Federal Communications Comm. v. Beach Communications, 508 U.S. 307,313 (1993)).

In this case, plaintiff contends that the Township defendants violated his equal protection rights when they participated in the re-grading of the road bordering his property and when they forced him to connect

to the Township sewer system. There is no suggestion that the Township defendants' decisions regarding road re-grading or sewer connection somehow proceeded along suspect lines or infringed a fundamental constitutional right. Plaintiff does not allege that the Township defendants' decision to re-grade the road bordering plaintiff s property lacked a rational basis and there is no evidence that the Township defendants' decision to require plaintiff to connect to the Township sewer lacked a rational basis. For these reasons, plaintiff s claims based on equal protection grounds cannot survive summary judgment.

(2) . Due Process

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of law ..... The due process clause contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them[, and] ... it is a guarantee of fair procedure, sometimes referred to as procedural due process,' (under which the State may not] take property without providing appropriate procedural safeguards."
Rivkin v. Dover Township) Rent Leveliniz Bd., 143 N.J. 352, 364 (1996) (quoting Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring)), cert. denied, 117 S. Ct. 275 (1 996). Read liberally, plaintiff s complaint asserts both procedural and substantive due process claims.

Procedural due process is a flexible concept, "'call(ing] for such procedural protections as the particular situation demands.'" Gilbert v. Homar, 117 S. Ct. 1807, 1812 (1997) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)); Mettinger v. Globe Slicing Machine Co., Inc., 153 N.J. 371, 389 (1998). Minimum requirements are notice and an opportunity to be heard. See Mettinger , 153 N.J. at 389; In re C.A., 146 N.J. 71, 94 (1996). However, what is required to satisfy procedural due process in a given situation depends on the balancing of three factors first the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such

interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Plaintiff contends that the Township defendants violated his right to procedural due process when they participated in the re-grading of the road bordering his property, advertise that plaintiff s property would be sold at a tax sale, and forced him to connect to the Township sewer system. In respect of the road re-grading and sewer connection, New Jersey has an adequate procedure for seeking just compensation. See N.J. STAT. ANN. 20:3-1 et seq.; Cuzzupe v. Paparone Realtity Co., 596 F. Supp. 988, 990 (D.N.J. 1984) (finding that N.J. STAT. ANN. 20:3- I et. seq. "provides an adequate post-deprivation remedy"). In respect of the tax sale, the Township is empowered to sell a taxpayer's property in order to collect unpaid taxes. See N.J. STAT. ANN. 54:5-19 et seq. There is no suggestion that plaintiff was denied his right to appeal the amount of taxes owed to the State Board of Tax Appeals, see N.J. STAT. ANN. 54:1-41, or that defendant Warren, the Township Tax Collector, did not comply with the notice provisions of the Tax Sale Law, see N.J. STAT. ANN. 54:5-25 to -27. As with the alleged deprivations of property, plaintiff s due process rights are not violated where he failed to avail himself of known procedures. See Waste Conversion, Inc. v. Sims, 868 F. Supp. 643, 652 (D.N.J. 1994).

In regard to the tax sale, plaintiff alleges that he was given no opportunity to be heard on the issue of how much he owed to the Township and that, as a result, N.J. STAT. ANN. 54:5-19 and N.J. STAT. ANN. 40:14A-2 1, cited by defendant Warren as authority for the sale, are unconstitutionally vague and violate plaintiff s rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article I of the New Jersey Constitution. There is no evidence that N.J. STAT. ANN. 26:3-3 1, or its corresponding municipal ordinance, is vague on its face or as applied. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

"To establish a substantive due process claim, a plaintiff must prove that it was deprived of a protected property interest by arbitrary or capricious government action." Sameric Corp. of Del., Inc. v. City of Philadelphia , 142 F.3d 582, 590 (3d Cir, 1998). Governmental action offends substantive due process if it is "not rationally related to a legitimate governmental interest" or if it was "in fact motivated by bias, bad faith or improper motive." Id. (citation and internal quotation marks omitted). Plaintiff contends that the Township defendants violated his right to substantive due process when they participated in the re-grading of the road bordering his property and forced him to connect to the Township sewer system. Even assuming that plaintiff was deprived of a protected property interest, plaintiff does not allege that the Township defendants' decision to re-grade the road bordering his property was arbitrary. Nor does he present evidence that the Township defendants' decision to require plaintiff to connect to the Township sewer system was arbitrary or capricious.

For these reasons, plaintiff s procedural and substantive due process claims can not survive summary judgment.

(3) Statutory claims

Plaintiff alleges that, in re-grading the road bordering his property, the Township defendants violated his rights under the New Jersey Flood Hazard Control Act and the National Flood Insurance Act. He alleges that defendant Bernards Township Municipal Court refused to provide plaintiff with transcripts of ex parte conversations that took place between the municipal court judge, the prosecutor and defendants J. Knox Felter, Jr. and Barbara J. Pence, Township Administrator, in violation of the New Jersey Right to Know Law and the common law right to know. And, he alleges that the Township defendants' actions in requiring him to connect to the Township sewers constitute a conspiracy to violate plaintiff s civil rights pursuant to 42 U.S.C. § 1985 ("Section 1985") and 18 U.S.C. §§ 1961 et seq. The Township defendants contend that the Flood Hazard Control Act and the National Flood Insurance Act provide no private right of action. The Township defendants argue that the New Jersey Right to Know Law provides no private right of action for damages

and, further, that plaintiff s Right to Know claim is moot because the Township defendants provided plaintiff with a copy of the transcript of the municipal court proceeding. Finally, the Township defendants argue that plaintiff s Section 1985 and 18 U.S.C. §§ 1961 et. seq. claims are insufficiently plead and must be dismissed.

The New Jersey Flood Hazard Control Act empowers the Department of Environmental Protection to enforce its provisions and any rule, regulation or order adopted pursuant thereto. See N.J. STAT. ANN. 58:16A-63. The National Flood Insurance Act empowers "the appropriate Federal entity" to enforce the obligations that lending institutions have under the Act, see 42 U.S.C. § 4012a(f)(1), and the Director of the Federal Emergency Management Agency to withhold insurance coverage from properties found to be in violation of state or local laws, regulations or ordinances intended to preserve flood-prone areas, see 42 U.S.C. 4023. However, neither the New Jersey Flood Hazard Control Act nor the National Flood Insurance Act creates a private cause of action. Plaintiff s claims under those Acts cannot survive summary judgment.

The New Jersey Right to Know Law provides, in pertinent part, that

> all records which are required by law to be made, maintained or kept on file by any board, body, agency, department, commission or official of the State or any of the political subdivision thereof or by any public board, body, commission or authority created pursuant to law by the State or any of its political subdivision, or by any official acting for or on behalf thereof (each of which is hereinafter referred to as the "custodian" thereof) shall, for purposes of this act, be deemed to be public records. Every citizen of this State, during the regular business hours maintained by the custodian of my such records, shall b-@ the right to inspect such records. Every citizen of this State shall also have the right, during such regular business hours and under the supervision of a representative of the custodian, to copy such records by hand, and shall also have the right to purchase copies of such records.

N.J. STAT. ANN. 47: 1 A-2. Records of official court proceedings are required by law to be made, N.J. STAT. ANN. 2B:7-1, and are,

therefore, public records within the meaning of the New Jersey Right to Know Law. Thus, the record of the municipal court proceeding regarding plaintiff's sewer connection was a public record and plaintiff was entitled to inspect and copy or obtain copies of the record. Moreover, if plaintiff was denied a copy of the hearing record, he would have been entitled to "apply to the Superior Court of New Jersey by a proceeding in lieu of prerogative writ for an order requiring the custodian of the record to afford inspection, the right to copy or to obtain a copy thereof." N.J. STAT. ANN. 47: 1 A-4. That the New Jersey Right to Know Law does not provide a private right of action for damages does not preclude plaintiff from seeking a copy of the hearing. However, because the Township defendants have provided plaintiff with a copy of the municipal court transcript, plaintiff's Right to Know claim is moot and will be dismissed on summary judgment.

Plaintiff raises a claim against the Township defendants under Section 1985, alleging defendants' participation in a conspiracy to deprive plaintiff of his civil rights. "However, Section 1985 was not intended to apply to all tortious interferences with the rights of others, but only to those which are founded upon some class-based or racial invidiously discriminatory intent." Maida v. Andros, 710 F. Supp. 524, 529 (D.N.J. 1988); see Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997) (listing four factors that must be alleged to state a claim under 42 U.S.C, § 1985(b): (1) conspiracy; (2) motivated by racial or class-based discriminatory animus intended to deprive any person of equal protection; (3) act in furtherance of conspiracy; and (4) injury). Because plaintiff has not alleged such animus, his Section 1985 claim will be dismissed.

Plaintiff also raises a claim against the Township defendants under 18 U.S.C. §§ 1961 et seq., or the Racketeer Influenced and Corrupt Organizations Act ("RICO"). RICO, 18 U.S.C. § 1962, prohibits the following activities:

(a) It shall be unlawful for any person who has received any income derived, directly and indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal ... to use or invest, directly or indirectly,

any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce ....

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section.[2]

18 U.S.C. § 1964(c) provides a private right of action to "(a]ny person injured in his business or property by reason of a violation of section 1962." Plaintiff has not alleged a pattern of racketeering activity, collection of an unlawful debt, existence of an enterprise, or participation of the Township defendants in or activities which affect interstate or foreign commerce. For these reasons, plaintiff s RICO claim cannot survive summary judgment.

(4) Torts

Plaintiff alleges that the Township defendants' actions in re-grading the road bordering his property constituted a trespass and a nuisance. Plaintiff also alleges that, in requiring him to connect to the Township sewers, the Township defendants engaged in malicious prosecution, abuse of process and negligence, and maliciously and tortiously interfered with a contractual relationship. The Township defendants

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[2] 18 U.S.C. § 1961 defines, inter alia, the terms "racketeering activity," liperson," enterprise," "pattern of racketeering activity," and "unlawful debt."

contend that each of plaintiff's tort claims must be dismissed for failure to file a Notice of Claim pursuant to the New Jersey Tort Claims Act. Even if the Tort Claims Act does not protect them, the Township defendants contend that the state procedures governing condemnation were adequate to protect plaintiff s right against trespass or nuisance. The Township defendants further contend that plaintiff s malicious prosecution claim is without basis because the case was terminated only after plaintiff complied and, in any event, such claim would have been properly dealt with on appeal.

The New Jersey Tort Claims Act provides that "[n]o action shall be brought against a public entity under this act unless the claim upon, which it is based shall have been presented in accordance with the procedure set forth in this chapter." N.J. STAT. ANN. 59:8-3. The procedure set forth requires a claimant to (1) file a Notice of Claim within ninety days of the accrual of the cause of action; (2) allow six months to pass from the date Notice is given before filing a complaint; and (3) file the complaint within two years from the accrual of the cause of action. See N.J. STAT. ANN. 59:8-8. Plaintiff has never filed a Notice of Claim in support of his claims for trespass, nuisance, malicious prosecution, negligence, abuse of process, or malicious and tortious interference with a contractual relationship. These claims are therefore properly dismissed on summary judgment. See Johnson v. Does, 950 F. Supp. 632, 634-35 (D.N.J. 1997) (holding that failure to comply with notice provisions mandates dismissal).

1 Motion for Judgment on the Pleadings

a. Standard of Review

FED. R. Civ. P. 12(c) provides, in pertinent part, that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Pursuant to FED. R. Civ. P. 12(h)(2), it is proper for a defendant to raise the defense of failure to state a claim upon which relief can be granted in a motion for judgment on the pleadings. In considering such a motion, the Court applies the same legal standards used in considering a motion to dismiss under FED. R. Civ. P. 12(b)(6).

The court cannot dismiss an action pursuant to FED. R. Civ. P. 12(b)(6) unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claims as plead which would entitle plaintiff to relief See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Factual allegations raised in the complaint must be assumed to be true. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Kost v. Kozakiewiez, I F.3d 176, 183 (3d Cir. 1993). Further, the complaint should be construed liberally in plaintiff s favor, giving that party the benefit of all fair inferences. See Wilson v. Rackmill, 878 F.2d 772, 775 (3d Cir. 1989). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

b. Application

Plaintiff alleges that he requested a review of the re-grading by defendant DEP and that defendant DEP has repeatedly refused to hand over its report in violation of the New Jersey Right to Know Law and the common law right to know. Plaintiff also alleges that the DEP and its Commissioner reclassified wetlands on plaintiff s property in violation of plaintiff s rights under Article I of the New Jersey Constitution and, pursuant to 42 U.S.C. § 1983, the Fifth and Fourteenth Amendments of the United States Constitution. Plaintiff further alleges that the New Jersey Freshwater Wetlands Protection Act and its attending regulations are unconstitutionally vague and violate plaintiff s rights as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and the New Jersey Constitution. In regard to its re-grading report, defendant DEP claims Eleventh Amendment immunity and, alternatively, contends that the claim is moot because the report has been handed over. On the wetlands reclassification claim, the DEP and its Commissioner claim Eleventh Amendment immunity. Neither defendant defends the constitutionality of the New Jersey Freshwater Wetlands Protection Act and its regulations.

As set forth above, the New Jersey Right to Know Law provides New Jersey citizens with the right to inspect and copy "all records which are required by law to be made, maintained or kept on file" by any

state entity or official action on behalf of such entity. See N.J. STAT. ANN. 47: 1 A-2. Defendant DEP does not dispute that its re-grading report was a public record within the meaning of the New Jersey Right to Know Law or that plaintiff was entitled to inspect and a copy of the report or bring an action to obtain such copy. N.J. STAT. ANN. 47: 1 A-4. However, because the DEP has, since the filing of this action, provided plaintiff with a copy of its report, plaintiff s Right to Know claim will be dismissed as moot.

The Eleventh Amendment bars federal court suits against a state by its own citizens or by citizens of another state or foreign country. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION §7.4, at 384 (1994). This immunity extends to state agencies, see id. at 388, as well as state officers, "'when the action is in essence one for the recovery of money from the state,'" id. §7.5, at 394 (quoting Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 464 (1945)). There are, however, several ways around the Eleventh Amendment. A state can waive its Eleventh Amendment immunity. Congress can abrogate Eleventh Amendment immunity when enacting statutes pursuant to Section 5 of the Fourteenth Amendment. See FitzDatrick v. Bitzer, 427 U.S. 445 (1976). Congress can also abrogate Eleventh Amendment immunity when adopting statutes pursuant to other than the Fourteenth Amendment, so long as it clearly states its intent to subject states to federal lawsuits under the statute. See CHEMERINSKY, §7.7, at 417.

In this case, plaintiff is suing the DEP and its Commissioner, in his official capacity, for alleged violations of his rights under the Fifth and Fourteenth Amendments, pursuant to 42 U.S.C. § 1983. The Supreme Court has held that Section 1983 does not abrogate Eleventh Amendment immunity. See Quem v. Jordan, 440 U.S. 332, 345 (1979). Thus, the DEP and its Commissioner may claim Eleventh Amendment immunity from plaintiff s Section 1983 claim. The same is true for plaintiff s parallel claim under Article I of the New Jersey Constitution. These claims are properly dismissed on summary judgment for lack of jurisdiction. As for plaintiff s claim that the New Jersey Freshwater Wetlands Protection Act and its regulations are unconstitutionally vague, there is no evidence that the Act or its

regulations are vague on their face or as applied. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

3. Miscellaneous

a. Sewer Tax

Plaintiff alleges that the Bernards Township sewer tax is arbitrary because the Township can force its citizens to connect to or disconnect from the sewers, because the Sewerage Authority does not indemnify its citizens for "back-ups," and because the tax is not uniform on the township, county or state levels. On this basis, plaintiff alleges that the sewer tax violates the Uniformity Clauses of the United States and New Jersey Constitutions and plaintiff s due process rights as protect by the Fifth and Fourteenth Amendments of the United States Constitution. None of the defendants have defended this claim.

Article 1, section 8, clause I of the United States Constitution establishes Congress's power to lay and collect taxes and requires that such taxes "be uniform throughout the United States." This Uniformity Clause limits only the United States Congress and is, therefore, not applicable in this case. Article 8, Section I of the New Jersey Constitution requires that state taxes be uniform. Although plaintiff asserts that the Township sewer tax is not uniform, he provides no evidence that the tax is not assessed according to the value of the property in the Township. See Cooper Hosp. v. City of Camden, 68 N.J.L. 691, 694 (1903) (classifying sewer taxes as taxes on property at large rather than assessments for local improvements); State v. Mayor, Etc., of City of Paterson, 49 N.J.L. 380, 380 (1887) (same). Moreover, plaintiff s claim that the sewer tax violates his due process rights is barred because there are adequate remedies available for challenging tax assessments under state law. See General Motors Corp. v. City of Linden, 143 N.J. 336, 348-50 (1996) (finding that New Jersey state law remedies for tax challenges "are adequate to preclude section 1983 suits in either federal or state courts"), cert. denied, 117 S. Ct. 66 (1996).

b. New Jersey Eminent Domain Statute

Plaintiff alleges that, on March 27, 1997, defendant PSE&G filed suit in Superior Court, New Jersey to exercise eminent domain over plaintiff s property and that, as a result, plaintiff s interest in his property was diminished, he was required to expend additional sums of money, and he was unable to pursue all claims arising out of the condemnation in one forum. For these reasons, plaintiff alleges, the New Jersey Eminent Domain Statute violates plaintiff s rights as protected by the Fifth and Fourteenth Amendments of the United States Constitution. No defendant has defended this claim.

It is fundamental that "[c]onstitutions do not give but merely place limitations upon the power [of eminent domain], which would otherwise be without limitation." State v. Lanza, 48 N.J. Super. 362, 370 (Law Div. 1957), aff d, 27 N.J. 5 16 (1958). The Fifth Amendment provides that no "private property [shall] be taken for public use, without just compensation." U.S. CONST., amend. V. However, if a state provides an adequate procedure for seeking just compensation, a federal district court lacks subject matter jurisdiction over a Fifth Amendment claim until the plaintiff has utilized the state procedure and been denied just compensation. See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-95 (1985); Stern v. Halligan, 158 F.3d 729, 734 (3d Cir. 1998). New Jersey has an adequate procedure for seeking just compensation. See N.J. STAT. ANN. 20:3-1 et seq.; Cuzzupe v. Paparone Realty Co., 596 F. Supp. 988, 990 (D.N.J. 1984) (finding that N.J. STAT. ANN. 20:3-1 et seq. "provides an adequate post-deprivation remedy"). That New Jersey does not provide the procedure that plaintiff would choose or that plaintiff did not pursue the remedy available under New Jersey law does not enable him to now claim that his rights under the Fifth Amendment have been deprived

c Entire Controversy Doctrine

Plaintiff alleges that the New Jersey Entire Controversy Doctrine is unconstitutional because it violates the Article III "case or controversy" requirement, the Article IV "full faith and credit" clause, and the Fourteenth Amendment Due Process clause of the United

States Constitution. Plaintiff adds that the doctrine is overly burdensome, its application arbitrary, and its effect to require unripe cases to be heard. None of the defendants have defended this claim.

New Jersey Court Rule 4:3OA codifies the entire controversy doctrine and provides that " [n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions)." The doctrine originally "mandated joinder of only those claims arising from 'the same overall transaction' involving the parties already named in the lawsuit." DiTrolio v. Antiles, 142 N.J. 253, 266 (1995) (quoting Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 343-44 (1984)). However, the New Jersey Supreme Court eventually extended the "doctrine to mandate joinder of 'all parties with a material interest, one that can affect or be affected by the judicial outcome of a legal controversy.'" Id. at 267 Cogdet v. Hospital Ctr., 116 N.J. 7, 23 (1989)). The entire controversy doctrine is thought to reflects a basic concept of judicial administration that is of constitutional dimension." Id. (citing N.J. CONST. art. VI, § 3, T 4). Three purposes for the doctrine have been enunciated: (1) comprehensive adjudications; (2) fairness to the litigants; and (3) judicial efficiency. Id.

The Court recognizes that the entire controversy doctrine may be somewhat burdensome. However, contrary to plaintiff s claim, the entire controversy doctrine does not violate the "case or controversy" requirement by running afoul of the constitutional requirement of justiciability. The doctrine does not violate the "full faith and credit" clause by requiring courts to eschew judgments entered by sister courts. Nor does the doctrine violate procedural due process by failing to provide an opportunity to be heard. This claim is without merit.

(b) Plaintiff s Motions

(1) Motion to Strike Answers, to Find Defendants in Contempt, to Enter Default, and for Costs and Fees

Plaintiff contends that defendants have failed to answer interrogatories. On this basis, plaintiff moves for an order striking defendants' answers, finding defendants in contempt, entering default, and awarding costs and fees. Defendants contend that plaintiff did not serve his interrogatories in time. Alternatively, defendants argue that plaintiff filed this motion without making a good faith effort to obtain the discovery without court action. Notwithstanding, since the filing of plaintiff s motion, PSE&G and the Township defendants have provided answers, FED. R. Civ. P. 37(a)(2)(A) provides that,

> [i]f a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

If such a motion is granted or if the discovery is provided only after the motion is filed, the Court must direct the non-moving party "to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees." FED. R. Civ. P. 37(a)(4)(A). If the non-moving party still refuses to comply with discovery after an order has been entered, the Court may find that party in contempt or enter default. See FED. R. Civ. P. 37(b)(2)(C), (D).

Assuming for the sake of this motion that plaintiff s interrogatories were filed in time, the Court finds plaintiff s motion insufficient for failure to include a certification that he in good faith conferred or attempted to confer with defendants in an effort to secure the answers without resorting to the Court. For this reason alone, plaintiff s motion may be denied. The Court also notes that, in light of the disclosures made by PSE&G and the Township defendants, plaintiff s motion as it relates to them is moot and the Court is not compelled to award costs where no good faith certification has been provided. See FED. R. Civ. P. 37(a)(4)(A). Moreover, as the Court has determined that summary judgment is appropriate on each of plaintiff s claims against the State defendants, plaintiff s motion as it relates to them is also moot and no costs will be awarded. See FED. R. Civ. P. 37(a)(4)(A)

(2) Motion to Extend Time for Discovery

In ruling upon discovery motions, the trial court is vested with very broad discretion. See National Gateway Telecom, Inc. v. Aldridge, 701 F. Supp. II 04, 19 (D.N.J. 1988), aff d, 879 F.2d 858 (3d Cir. 1989). Pursuant to FED. R. Civ. P. 16(b), a magistrate judge is authorized to enter a scheduling order that limits the time to complete discovery. In this case, Magistrate Judge Freda L. Wolfson entered a scheduling order which, inter alia, required that discovery be completed on or before September 30, 1998. See Barth v. PSE&G, et al., No. 97-2163 (D.N.J. July2O, 1998). Plaintiff now seeks an order which extends the time for discovery by sixty days.

FED. R. Civ. P. 16(b) provides that a scheduling order "shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.' " See also FED. R. Civ. P. 16(b) advisory committee's note ("[T]he court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension."). In order to establish good cause, the proponent must "demonstrate that a more diligent pursuit of discovery was impossible." Wright v. Montgomery Court, No. 96-4597,1998 WL 848107, at *6 (E.D. Pa. Dec. 4,1998) (citing MeElyea v. Navistar Int'l Trans. Com., 788 F. Supp. 1366, 1371 (E.D. Pa.), aff d, 950 F.2d 723 (3d Cir. 1991)). In this case, plaintiff has not demonstrated the impossibility of a more diligent pursuit of discovery. Moreover, in light of the Court's rulings on defendants' motions, any extension of the discovery deadline would be academic. The motion will be denied.

(3) Motion for Leave to File an Amended Complaint

Granting leave to amend pleadings rests within the sound discretion of the court. See Massarsky v. General Motors Corp., 706 F.2d 11 1, 125 (3d Cir.), cert. denied, 464 U.S. 937 U.S. 937 (1983). The Court is guided by the rule that leave "shall be freely given when justice so requires." Fed R. Civ. P. 15(a). The policy that a party should be afforded an opportunity to test his or her claim on the merits further guides the determination of whether an amendment will be permitted.

See Foman v. Davis, 371 U.S. 178, 182 (1969). In Foman, the United States Supreme Court articulated a liberal standard for Rule 15(a) amendments:

In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.--the leave sought should, as the rules require, be "freely given." Id. A motion to amend may properly be denied as futile where the amendment would not withstand a FED. R. Civ. P. 12(b)(6) motion to dismiss. See Massarsky, 706 F.2d at 125. "If a proposed amendment is not clearly futile, then denial of leave to amend is improper." Harrison Beverage Co. v. Dribeck Importers, Inc., 133 F.R.D. 463, 468 (D.N.J. 1990).

While mindful of the liberal standard according to which Rule 15(a) motions to amend are considered, the Court concludes that plaintiff s proposed amendment is clearly futile.

(4) Motion for Leave to File a Late Notice of Claim

In opposition to defendants' motions, plaintiff requests leave to file a late Notice of Claim under the New Jersey Tort Claims Act. N.J. STAT. ANN. 59:8-9 provides, in pertinent part, that

(a] claimant who fails to file notice of his claim within 90 days as provided in section 59:8-8 of this act, may, in the discretion of a judge of the superior court, be permitted to file such notice at any time within I year after the accrual of his claim provided that the public entity has not been substantially prejudiced thereby .... (I]n no event may any suit against a public entity arising under this act be filed later than 2 years from the time of the accrual of the claim.

This section of the Tort Claims Act grants the New Jersey Superior Court discretion to grant or deny a claimant's request to file a late Notice of Claim; it vests no discretion in this Court. For this reason, plaintiff s request must be denied. The Court notes that such a request would be denied by a court with jurisdiction, as it appears that

plaintiff s claims accrued more than one year ago and, in those instances where dates have been provided, more than two years ago.

III CONCLUSION

For the foregoing reasons, PSE&G's motion for summary judgment is granted. The motion for summary judgment filed by the Township defendants is granted. The State defendants' motion for judgment on the pleadings is granted. Plaintiff s motions are denied, mooting the State defendant's cross-motion to quash plaintiff s interrogatories.

Dated: 2-19-99

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

MICHAEL BARTH, Civil No. 97-2163 (AET)

Plaintiff,

v ORDER

PUBLIC SERVICE ELECTRIC AND GAS, et al.,

Defendants.

This matter is before the Court on a number of motions. Plaintiff Michael Barth ("plaintiff') fil6d motions to strike defendants' answers, to find defendants in contempt to enter default, for costs and fees, to extend time for discovery, and for leave to file an amended complaint. Defendant Public Service Electric and Gas ("PSE&G") filed a motion for summary judgment. Defendants State of New Jersey, Department of Environmental Protection ("DEP") and its Commissioner ("State defendants") filed a cross-motion to quash plaintiff s interrogatories and a motion for judgment on the pleadings. Defendants Township of Bernards, Bernards Township Sewage Authority, Bernards Township Board of Health, Bernards Township Municipal Court, J.Knox Felter, Jr., Peter A. Messina, P.E., P.P., Peggy Warren, and Barbara J. Pence ("Township defendants") filed separate motions for summary judgment on plaintiff s condemnation claim and on plaintiff s compensatory non-inverse condemnation claims,

Having reviewed the parties' submissions, and for good cause shown,

IT IS on this 19th day of February 1999,

ORDERED that the motion for summary judgment filed by PSE&G is granted; and it is further ORDERED that the motion for summary judgment filed by the Township defendants is granted; and it is further ORDERED that the motion for judgment on the pleadings filed by the State defendants is granted; and it is further ORDERED that plaintiff s motions to strike defendants' answers, to find defendants in

contempt, to enter default, for costs and fees, to extend time for discovery, and for leave to file an amended complaint are denied; and it is further ORDERED that the State defendant's cross-motion to quash plaintiff s interrogatories is dismissed as moot.

signed
ANNE E. THOMPSON, Chief Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
97-5368 & 98-5059

MICHAEL BARTH, Appellant

v.

PUBLIC SERVICE ELECTRIC & GAS; TOWNSHIP OF BFRNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY; BERNARDS TOWNSHIP BOARD OF HEALTH; BERNARDS TOWNSHIP MUNICIPAL COURT; J. KNOX FELTER, JR., SENIOR SANITARIAN, BERNARDS TOWNSHIP; PETER A. MESSINA, P.E., P.P. TOWNSHIP ENGINEER/PLANNER; PEGGY WARREN, CERTIFIED TAX COLLECTOR, BERNARDS TOWNSHIP; BARBARA J. PENCE, TOWNSHIP ADMIISTRATOR; J. DOE(S), individually and in their official capacity; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS; A.D. RUNYON OIL COMPANY; HARRY P. BELDON, ATTORNEY AT LAW

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, Circuit Judges, and GARTH, Senior Circuit judge*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

*As to panel rehearing only

By the Court,

C1

Circuit Judge
DATED: JAN - 5 1999

C2

UNITED STATES DISTRICT COURT
DISTRICT COURT OF NEW JERSEY

Michael Barth,

Plaintiff,

Vs

CERTIFICATE OF CLERK
CIVIL 97-2163 (AET)

Public Service Electric and Gas, et al.,

Defendants.

It appearing the plaintiff having requested the entry of default as to the defendants Public Service Electric and Gas (served on July 30, 1997) and Bernards Township Sewage Authority (served on July 29, 1997) for failure to plead It appearing said defendants were properly served on the aforementioned dated;

It is hereby certified default for failure to plead had been entered this 22ND August 1997 against said defendants.

William T. Walsh, Clerk

Signed
Deputy Clerk

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

MICHAEL BARTH,

Plaintiff,

V. ORDER

PUBLIC SERVICE ELECTRIC AND GAS, et al.,

Defendants.

For the reasons set forth in this Court's Opinion on this date, It is on this 23rd day of October, 1997

ORDERED that defendant Public Service Electric and Gas's cross-motion to vacate entry of default be and hereby are granted; and it is further

ORDERED that defendant Bernards Township Sewage Authority's motion to vacate entry of default be and hereby are granted; and it is further

ORDERED that plaintiff s motion to strike defendant Public Service Electric and Gas Co.'s answer from the record be and hereby is denied; and it is further

ORDERED that plaintiff s motion to grant default judgment against defendants Public Service Electric and Gas and Bernards Township Sewage Authority be and hereby is denied as moot; and it is further

ORDERED that plaintiff s motion to enter default against certain laws and ordinances be and hereby is denied; and it is further

ORDERED that defendant Bernards Township Sewage Authority file its answer in this case within fourteen days of the date of this order.

Signed
ANNE E. THOMPSON, CHIEF JUDGE

D 2

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL BARTH, (AET)

Civil No. 97-2163

Plaintiff,

V.

OPINION

PUBLIC SERVICE ELECTRIC AND GAS, et al.,

Defendants.

This matter is before the Court on motions by plaintiff Michael Barth, defendant Public Service Electric and Gas ("PSE&G") and defendant Bernards Township Sewage Authority ("BTSA"). Plaintiff moves for certification of default and entry of default judgment against defendants PSE&G and BTSA, and to strike PSE&G's answer from the record. Plaintiff also moves for entry of default against certain statutes and local ordinances. Defendants PSE&G and BTSA each move to vacate default. The Court decided the motion without oral argument in accordance with FED. R. Civ. P. 78. For the following reasons, defendants' motions to vacate entry 6f default are granted and plaintiff s motions to enter default against certain statutes and regulations, grant default judgment against defendants PSE&G and BTSA, and strike defendant PSE&G's answer are denied.

I. BACKGROUND

Plaintiff brings suit against numerous defendants, including PSE&G and BTSA, in connection with the re-grading of a road bordering plaintiff s property and the construction of a storm water drainage system and a "temporary gas line." Plaintiff alleges constitutional violations, violations of the Federal Natural Gas Pipeline Safety Act, the New Jersey Natural Gas Pipeline Safety Act, as well as common law violations for breach of contract, negligence, bad faith and waste, among other things. Plaintiff filed his complaint on April 17, 1997. Plaintiff alleges that the summons and complaint were served on

defendant PSE&G on July 30, 1997 and on defendant BTSA on July 29, 1997. Default was entered as to defendants PSE&G and BTSA on august 22, 1997 for failure to plead. Plaintiff's motion for default judgment was filed on august 28, 1997. PSE&G filed its answer to the complaint on August 28, 1997. BTSA has not yet filed its answer to the complaint.

Defendant PSE&G's attorney asserts that defendant's failure to file a timely answer was not willful or intentional. In his certification, PSE&G's attorney states that he was confused as to the status of the pleadings because plaintiff did not serve the complaint until almost three months after it was filed. PSE&G's attorney assert that he endeavored to draft an answer and had believed it was filed. The attorney concedes that through neglect and inadvertence, the answer was not timely filed. The attorney states that once he became aware in early August that the answer was not filed, he finalized his draft and filed an answer on August 28, 1997. A day or two after mailing his client's answer, the attorney received plaintiff's instant motion papers and responded with a letter to the court dated September 4, 1997, indicating that an answer had been timely filed. The attorney states that he believed that plaintiff was not entitled to default. Counsel asserts that because of his lack of experience in federal practice, he erroneously assumed that the 15 day extension under general rule 13(b) was an automatic extension which did not require the Court's consent. In his certification, counsel notes that plaintiff sought entry of default only days after the expiration of the answer was due, and gave no prior notice of the request for default. Defendant BTSA also moves to vacate default entered against it on August 22, 1997. In his certification, counsel for defendant BTSA asserts that no employee or agent of BTSA was ever served with plaintiff s complaint. While a deputy clerk of Bernards Township was served on or about July 29, 1997, counsel states that such clerk was not authorized to accept service on behalf of the Authority and, thus, service was improper. Counsel to defendant BTSA also asserts in his certification that even assuming proper service of the complaint was made, BTSA's failure to file an answer was caused by a lack of communication. Defendant's counsel states that his firm was not aware until after plaintiff filed his motion for default judgment that Bernards Township's insurance carrier did not file an answer on

behalf of BTSA and would not be representing BTSA in this matter. Counsel states that as soon as BTSA was aware of the situation, they attempted to rectify it by requesting plaintiff s consent to vacate default; however, plaintiff has refused to consent. In response, counsel prepared the instant motion to vacate default and they plan to file an answer.

II. DISCUSSION

FED. R. Civ. P. 55(c) states that:

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).

Courts generally disfavor the entry of default, preferring to have cases decided on the merits. See United States v. $55,518.05 in US Currency
728 F.2d 192, 194 (CA 3 1984); *see also* Schwab v. Bullock's Inc., 508 F.2d 353 (9th Cir. 1974); Gomes v. Williams, 420 F.2d 1364 (I Oth Cir. 1970). "Courts have also ruled that on a motion for relief from entry of a default or default judgment,:- aildoubtsshouldberesolvedinfavorofthepartyseekingrelief." 10C. Wright & A. Miller, Federal Practice and Procedure, §2693, at 485 (1973); see Medunic v. Lederer, 533 F.2d 891 (3rd Cir. 1976). When deciding whether to exercise its discretion to vacate entry of default judgment, a federal court must consider (1) whether vacating default would prejudice the plaintiff, (2) whether default was a result of defendant's culpable conduct, and (3) whether defendant has a meritorious defense. Emasco Insurance Co. v. Sambrick, 834 F.2d 71 (3d Cir. 1987).

However, courts have noted that setting aside entry of default is distinct from setting aside default judgment. See Feliciano v. Reliant Tooling Company, Ltd., 691 F.2d 653 (3d Cir. 1982). In Feliciano, the Third Circuit observed that:

There is a distinction between a default standing alone and a default judgment. If a judgment by default has been entered, it may be set

aside 'in accordance with Rule 60(b).' Id. Less substantial grounds may be adequate for setting aside a default than would be required for opening a judgment. Thus, '(a)ny of the reasons sufficient to justify . the -vacation of a default judgment under Rule 60(b) normally will justify relief from a default entry and in various situations a default entry may be set aside for reasons that would not be enough to open a default judgment Id. at 655 (citations omitted).

In the instant case, the Court finds that lifting the default against defendants would not disadvantage plaintiff s case to his prejudice. Prejudice can be shown through loss or destruction of evidence, increased potential for fraud and collusion, or substantial reliance upon the entry of default. Id, at 657. In the instant case, no such facts were alleged. Plaintiff contends that lifting the default would prejudice his case because the default is the equivalent of an injunction against any tax sale issues or condemnation of landowner's property and to vacate the default would prejudice the landowner. In addition, plaintiff argues that he did not initiate the action. These arguments do not explain how the plaintiff would be harmed by defending the actions on the merits and do not rise to the level of prejudice needed to sustain an entry of default. To be inexcusable or culpable, the defendant's conduct must have been willful or in bad faith. Feliciano, 691 F.2d at 657. See Feliciano, 691 F.2d at 656. "Appropriate application of the culpable conduct standard requires that as a threshold matter more than mere negligence be demonstrated." Hritz, 732 F.2d at H 3. In his opposition to defendants' motions, plaintiff makes the conclusory allegation that defendants' conduct was intentional. Although the instant case illustrates the danger to which a client is exposed by the erroneous assumptions of counsel, the Court does not find that there is any evidence that either defendants' actions were willful or in bad faith. In addition, the Court notes plaintiff s failure to notify defendants of his intention to adline for filing an answer,

I

Both defendants assert that they have meritorious defenses to plaintiff s claims. PSE&G argues that it has complied with all standards and regulations in the placement of the "temporary" gas line at issue in the Complaint and that plaintiff s challenges to the constitutionality of

certain New Jersey laws are frivolous. In its answer, PSE&G alleges that there was no contractual relationship existing between the plaintiff and itself and that there was no duty owing to the plaintiff. Defendant PSE&G asserts that plaintiff fails to state a claim upon which relief may be granted and asserts that the Court lacks personal jurisdiction. Furthermore, defendant asserts that the statute of limitations bars plaintiff s claims. Defendant BTSA argues that plaintiff s Complaint is vague and his claims are frivolous. In the form of answer submitted with BTSA's motion to vacate, twenty four (24) separate defenses are asserted, including the doctrine of laches, the doctrine of waiver, and comparative negligence.

In his opposition, plaintiff argues that because defendants have not provided any specific facts to support their defenses defendants have not met the threshold requirement of establishing a meritorious defense and, thus, default should not be vacated against either defendant. The Third Circuit has held that in determining whether to set aside default judgment, "[t]he showing of a meritorious defense is accomplished when allegations of defendant's answer, if established at trial, would constitute a complete defense." Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984). In light of the less stringent standard for vacating entry of default, this Court finds that in the instant case a defense to the complaint has been averred by both defendants.

Having observed that there is a strong preference to decide cases on the merits rather than by default, this Court concludes that defendants' actions are not sufficient to preclude vacating entry of default. Thus, defendants' motions to vacate default will be granted. However, given that defendant BTSA is aware that the deadline for its answer has passed and has provided the Court with a form of answer substantially similar to that which it plans on filing, the Court will order that defendant BTSA file its answer within fourteen days of the date of this opinion and accompanying order.

Plaintiff also moves for entry of default against N.J.S.A. 20 et. Seq, N.J.S.A. 48 et. Seq, N.J.S.A.26:3-31(d),N.J.S.A.40:14A-21,N.J.S.A. 54:5-19,N.J.S.A. 13:9B-1 et. Seq.,N.J.C.A. 7:7A-1 et seq., New Jersey Court Rule 4:30A and the Bernards Township Board of Health Ordinance BH: 13-2.2. Pursuant to FED. R. Civ. P. 55, default is

properly entered against parties in an action. Default cannot be entered against a rule, statute or ordinance. Thus, plaintiff s motion for entry of default against the above-mentioned laws is denied. Additionally, plaintiff moves to strike defendant PSE&G's answer from the record because it is untimely. Pursuant to FED. R. Civ. P. 12(f), a court may order stricken from any pleading any "insufficient defense or any redundant, inunaterial, impertinent, or scandalous matter." In the instant case, plaintiff does not assert that any portion PSE&G's answer is insufficient, redundant, immaterial, impertinent, or scandalous. Thus, the Court will deny plaintiff s motion to strike.

Finally, in light of the Court's determination to vacate default against defendants PSE&G and BTSA, this Court finds that plaintiff s motion for default judgment is moot.

III. CONCLUSION

For the aforementioned reasons, defendants' motions to vacate default are granted. Plaintiff s motions to strike defendant PSE&G's answer, enter default against certain laws and local ordinances, and grant default judgement against defendants PSE&G and BTSA are denied. An appropriate order is filed herewith.

A-361-99t1
ORDER ON MOTION

PUBLIC SERVICE ELECTRIC & GAS CO	SUPERIOR COURT OF NEW JERSEY
Vs	APPELLATE DIVISION
MICHAEL S BARTH, BERNARDS TOWNSHIP ETC;	DOCKET NO. A -000361-99T1
	MOTION *NO.* *M* -000975-99

BEFORE PART: G
JUDGE(S): KEEFE AND LINTNER

MOTION FILED: AUGUST 04, 1999
BY: MICHAEL S BARTH
ANSWER (S) FILED: AUGUST 13, 1999
BY: PUBLIC SERVICE ELECTRIC & GAS

SUBMITTED TO COURT: OCTOBER 20,

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT *IS ON* THIS
22nd DAY OF OCTOBER, 1999 HEREBY ORDERED AS FOLLOWS

MOTION BY APPELLANT	DENIED
FOR LEAVE TO APPEAL	X
- FOR STAY	
- FOR FURTHER RELIEF	

SUPPLEMENTAL:

It appears from the movant's papers that the appeal is from -final orders. The appeal shall proceed in normal fashion and shall be heard in due course.

SOM L-549-9'7
FOR THE COURT:
JOHN E. KEEFE J.A.D.

E 2

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
PO BOX 006
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, N.J. 08625-0006

NOTICE OF DOCKETING

Date: OCTOBER 18,1999

PAUL X HUMBERT ESQ.
PUBLIC SERVICE ELECTRIC AND GAS
80 PARK PLAZA
NEWARK, NJ 07102

Title: PUBLIC SERIVCE ELECTRIC & GAS CO VS MICHAEL BARTH
Docket Number: A -000361-99TI
Appeal Filed: 08/04/99
Case Manager: KAREN M CARROLL / Team 1 (609) 633-2252

1. The above docket number must appear on all documents submitted

2. Respondent shall file a case information statement within 15 days after service of the notice of appeal. R.2:5-1(a).

3. The time limits in R.2:6-11 must be complied with. The only exceptions are if you receive notification that the case has been selected for a settlement conference or a scheduling order is issued.
4. THE APPEAL WILL BE SUBJECT TO DISMISSAL WITHOUT FURTHER NOTICE FOR THE FOLLOWING: (A) FAILURE TO TIMELY FILE THE TRANSCRIPT OR ADVISE THE CLERK'S OFFICE OF ANY DIFFICULTY IN SAME; (B) FAILURE TO TIMELY FILE THE APPELLANT-S BRIEF.

5. IF RESPONDENT'S BRIEF *IS NOT* TIMELY FILED, IT WILL BE SUBJECT TO SUPPRESSION.

6. If oral argument is desired, it must be requested timely by a separate captioned paper. R.2:11-1(b). An appeal may be - calendared more quickly if oral argument is not requested. If oral argument is requested, notify the Clerk-s office of any period of time during which you will be unavailable.

Trial Court Docket No.: L-549-97

EMILLE R. COX
CLERK OF THE APPELLATE DIVISION

CC:
SUPERVISOR COURT REPORTING SOMERSET COUNTY
MICHAEL S BARTH

http://www.state.nj.us/judiciary/appdiv/homepage.htm

UNITED STATES DISTRICT COURT
DISTRICT COURT OF NEW JERSEY

Michael Barth, Plaintiff,	Civil Action
v.	Complaint and
Public Service Electric and Gas, N.J.S.A. 20 *et. seq* (Eminent Domain Statute); N.J.S.A. 48 *et. seq* (Public Utilities); N.J.S.A. 26:3-31(d) (Sewer Connection), N.J.S.A. 40:14A-21 N.J.S.A. 54:5-19 (Tax & Municipal Lien List), Bernards Township Board of Health Ordinance BH:13-2.2, Township of Bernards, Bernards Township Sewage Authority, Bernards Township Board of Health, Bernards Township Municipal Court, J. Knox Felter, Jr., Senior Sanitarian, Bernards Township, Peter A. Messina, P.E., P.P. Township Engineer/Planner, Peggy Warren, Certified Tax Collector, Bernards Township, Barbara J. Pence, Township Administrator,and J. Doe(s); individually and in their official capacities;N.J.S.A. 13:9B-1 *et seq.* (Freshwater Wetlands Protection Act), N.J.A.C. 7:7A-1 *et seq* (Wetlands Protection Act Rules), State of New Jersey Department of Environmental Protection and its Commissioners; A.D. Runyon Oil Company,Harry P. Beldon, Attorney At Law; New Jersey Court Rule 4:30A ("Entire Controversy Doctrine"),	Demand for Jury Trial Notice Constitutional Challenge
Defendants.	

JURISDICTION

1. This Court has jurisdiction by reason of 28 U.S.C. §1331. This action is founded on the existence of Federal Questions as it arises under the Constitution of the United States: Article I (Uniformity Tax Clause); Article III, § 2; Article IV § 1 ("Full Faith and Credit Clause"); the Fifth and Fourteenth Amendments; 42 U.S.C. §§ 1983, 1985; 49 App. §§ 60101 *et. seq*, 60121 (Pipeline Safety Acts); 42 U.S.C. § 4001 *et. seq*; and 18 U.S.C. §§ 1961 *et. seq* (RICO).

F1

2. Supplemental jurisdiction of common and N.J. law claims exists under 28 U.S.C. § 1367. This includes claims arising under the New Jersey Constitution, N.J.S.A. §§ 47:1A-1 *et. seq* (Right to Know); 48: 9-33 *et. seq* (Pipeline Safety); 58:16A-50 *et. seq* (Flood Control Act); 59:1-1 *et. seq* (Tort Claim Act). This also includes claims of Fraud, Malicious and Tortious Interference with a Contractual Relationship, Malicious Prosecution, Abuse of Process, Negligence, and Trespass - Destruction of Property.

3. Venue is proper in the District Court of New Jersey, vicianage of Newark as defendant PSE&G is a corporation of the State of New Jersey with its principal offices in the City of Newark, New Jersey.

4. Plaintiff owns property (Block 133 Lot 4) located in Bernards Township, a portion of which PSE&G seeks to condemn and of which Bernards Township seeks to sell in a Tax Sale.

5. Plaintiff complains of the defendants herein alleges as follows:

Count I - Fifth Amendment Taking Without Compensation

6. Incorporated by reference are paragraphs 1 to 5 of this Complaint.

7. Storm sewers owned by Bernards Township are installed below ground on landowner's private property and outside the Town's right-of-way. The Landowner pays taxes on that portion of property outside the township's right of way where the storm sewers are installed.

8. Bernards Township re-graded the road bordering the south of the subject property. One of the purposes of the re-grading was to remove a dip before and after a county bridge crossing a small river bordering the rear of subject property. This substantially raised the elevation of the road. The water from the river bordering the rear of subject property used to run-over the street during extreme heavy rains. However, the re-grading created, in effect, a weir dam,

subjecting the landowner's property to additional flooding. Now the water has to build up higher before it runs over the elevated roadway. This additional flooding illegally creates wetlands on the subject property.

9. The construction of a storm water drainage system owned by the Township is creating underground flooding on plaintiff's property. Water follows the loose gravel around the storm water pipes and saturates the ground and thereby raises the ground water table under the property. The sump pump is required to run excessively because of the raised ground water.

10. Repaving and curbing of the Road that borders the front of plaintiff's property was improperly designed by Bernards Township. There are no catch basins installed on the street in front and uphill of plaintiff's driveway. Water runs down and floods plaintiff's driveway.

11. Landowner has a fundamental constitutional property right. The Fifth Amendment to the United States Constitution states that "[N]or shall private property be taken for pubic use, without just compensation." One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

12. The Township's installation of the pipes on landowner's property without paying compensation and the flooding of plaintiff's property is a taking in violation of the U.S. Constitution. In doing so, Bernards Township and Mr. Messina, Township Engineer are liable for violating plaintiff's rights protected by the Fifth Amendment of the United States Constitution.

Counts II-III - Violation Rights Protected by Fourteenth Amendment; 42 U.S.C. § 1983

13. Incorporated by reference are paragraphs 1 to 12 of this Complaint.

14. The Takings Clause of the Fifth Amendment of the United States Constitution, applies to the States through the Fourteenth Amendment. The Fourteenth Amendment guarantees that no State shall deprive any person of "property" without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *U.S. Const.* Amend XIV; 42 U.S.C. § 1983. Bernards Township and its Engineer Mr. Messina have deprived plaintiff of Constitutional rights protected by the Fourteenth Amendment. Therefore, Bernards Township and Peter Messina, Township Engineer, are liable for violating plaintiff's rights protected under the Fourteenth Amendment of the United States Constitution.

Count IV - Violation of Rights Protected by the New Jersey Constitution

15. Incorporated by reference are paragraphs 1 to 14 of this Complaint.

16. The New Jersey Constitution considers the acquisition, possession, and protection of real "property" a "natural and unalienable right" subject to due process and equal protections. *N.J. Const.* Art. I, par. 1. Article I, ¶ 1 of the New Jersey Constitution states: "All persons are by nature free and independent, and have certain natural unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." Paragraph 20 states: "Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners." Bernards Township and Township Engineer Peter Messina have taken and authorized the taking of plaintiff's property without just compensation to the owner. Therefore, they are liable for violating plaintiff's rights protected by the New Jersey Constitution.

Counts V-VI - N.J. Flood Hazard Area Control Act 58:16A-50 & 42 U.S.C. § 4001

17. Incorporated by reference are paragraphs 1 to 16 of this Complaint.

18. The N.J. Flood Hazard Area Control Act prohibits the additional flooding of property by, *inter alia*, road re-grading projects. The road re-grading project created additional flooding on the subject property. Bernards Township and Mr. Messina, Township Engineer, did not obtain the proper permits for the re-grading project and are liable for violating plaintiff's right protected by the N.J. Flood Hazard Area Control Act 58:16A-50 *et seq* and 42 U.S.C. § 4001 *et. seq.*

Counts VII-IX - N.J. DEP Liable for Violating N.J. "Right to Know Law", N.J.S.A. 47:1A-1 *et seq.*, and Common Law right to know

19. Incorporated by reference are paragraphs 1 to 18 of this Complaint.

20. Landowner requested that the N.J. Department of Environmental Protection investigate Bernards Township's raising of the Minebrook road surface in a flood plain. The DEP concluded that Bernard Township did raise the road and cause additional flooding of plaintiff's property in violation of the law. The result of the raised road is additional flooding on plaintiff's property. On several occasions, the NJ DEP refused to turn over a copy of their report File No. 02-010-96. Accordingly the NJ DEP and its Commissioners are liable for violating the N.J. "Right to Know Law", N.J.S.A. 47:1A-1 *et seq.*, and the Common Law right to know. Moreover, Landowner is entitled to, *inter alia*, a copy of the NJ DEP report.

Count X - Trespass - Destruction of Property

21. Incorporated by reference are paragraphs 1 to 20 of this Complaint.

22. Bernards Township continues to trespass on landowner's property through the unconstitutional taking without compensation. There is substantial damage to landowner's property resulting from the trespass. Therefore, Bernards Township is liable for trespass and destruction of plaintiff's property.

Count XI - Nuisance

23. Incorporated by reference are paragraphs 1 to 22 of this Complaint.

24. Defendants are interfering with the use and enjoyment of defendant's property. Therefore, Bernards Township is liable for creating a nuisance.

Counts XII - XXI - Bernards Township Tax Sale and New Jersey Statutes N.J.S.A. 54:5-19 and N.J.S.A. 40:14A-21 violate rights protected by Fifth and Fourteenth Amendments of U.S. Constitution and Art. I of the N.J. Constitution

25. Incorporated by reference are paragraphs 1 to 24 of this Complaint.

26. Peggy L. Warren, Certified Tax Collector, advertised in the Courier News that The Township of Bernards will sell plaintiff's property at a Tax Sale on April 30, 1997 at 11:00 a.m. Ms. Warren indicates the Sale is pursuant to N.J.S.A. 54:5-19 and N.J.S.A 40:14A-21. By certified mail, the property owner disputed the amount claimed owed. Bernards Township never replied in writing to the dispute or provided an opportunity to be heard.

27. Therefore the Bernards Township Tax Sale violates plaintiff's rights protected by Fifth and Fourteenth Amendments of U.S. Constitution and Article I of the N.J. Constitution.. Accordingly, the Bernards Township Tax Sale of plaintiff's property scheduled for April 30, 1997 and New Jersey Statutes N.J.S.A. 54:5-19 and N.J.S.A. 40:14A-21 are unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution and Article I of the New Jersey Constitution.

Counts XXII to XXVII - N.J.S.A. 26:3-31(d) (Sewer Connection) and the Bernards Township Board of Health Ordinance BH:13-2.2 are unconstitutional under *U.S. Const.* Amend XIV; 42 U.S.C. § 1983; *N.J. Const.* Art. I, par. 1.

28. Incorporated by reference are paragraphs 1 to 27 of this Complaint.

29. Bernards Township forced landowner to connect to the Township sewers by unlawful means. The power imposed upon the plaintiff's property was arbitrary, unnecessary, unfair and unreasonable. The sewer connection requirement was an unreasonable burden. For example: The Township should have but failed to run the sewer line far enough down the street to properly connect landowner's home. The Authority failed to properly supervise the attempted installation of the sewer "lateral" at a second alternative location. This resulted in the rupture of an "unmarked" gas main directly bordering the front of the house. A proper connection to the third and eventual location of the installation of the sewer lateral required the moving of a heating oil tank and other extraordinary property damage.

30. There is no rational basis for requiring the landowner to connect to the sewers. There is no constitutional public policy requiring landowner to connect to the Township sewers. For example, new homes are still built in the township with septic systems. Moreover, plaintiff's land is over 6 acres, clearly enough for an operational septic system.

31. The Township's demands were cost prohibitive and an undue and unreasonable burden on landowner. Bernards Township, with full knowledge of these hardships, including extreme inclement cold weather, maliciously issued a summons, thereby jeopardizing plaintiff's house and property.

32. Moreover, enforcement of the law is unconstitutionally arbitrary. For example, landowner previously contracted to purchase other property in a different section of Bernards Township. (Under New Jersey law, a contract is a property right.) After the contract review period, it was determined that the septic system was failed. Mr. Felter, Senior Sanitarian Bernards Township, was notified of the septic system failure. Mr. Felter then identified the party who had violated the law by installing that failed septic system. The purchase could not be consummated until repairs to the failed septic system

were made. However, instead of enforcing the law, with full knowledge of that violation, Mr. Felter threatened Mr. Barth by stating that he would condemn that other property if Mr. Barth pursued the matter. Plaintiff rescinded that contract under coercion by Mr. Felter.

33. The power usurped upon the landowner is arbitrary, interferes with the fundamental rights of the landowner, and is repugnant to the Federal and N.J. Constitutions.

34. N.J.S.A. 26:3-31(d) (Sewer Connection) and the Bernards Township Board of Health Ordinance BH:13-2.2 are unconstitutionally vague and accordingly are unconstitutional under 42 U.S.C. § 1983, the Fifth and Fourteenth Amendments and the New Jersey Constitution..

35. Bernards Township, the Bernards Township Sewerage Authority, Bernards Township Board of Health, and J. Knox Felter are liable for violating plaintiff's rights protected under the Fifth and Fourteenth Amendments of the United States Constitution, 42 U.S.C. § 1983, and the N.J. Constitution.

Counts XXVIII-XXX Malicious Prosecution and Wrongful Interference

36. Incorporated by reference are paragraphs 1 to 35 of this Complaint.

37. On or about December 5, 1995, J. Knox Felter Jr., Bernards Township Sanitarian, filed a summons in Municipal Court, Bernards Township. Township of Bernards v. Barth, C-2161. In that summons, Bernards Township alleges that the landowner failed to connect property into the sanitary sewer within the required time period in violation of the Township Ordinance BH: 13-2.2. There was no probable cause for the issuance of such an order. Accordingly, Mr. Felter, Bernards Township, the Sewerage Authority and the Bernards Township Board of Health are liable for Malicious Prosecution and for the wrongful interference with plaintiff's possession and enjoyment of property.

Counts XXXI -XXXII - Bernards Township Liable for Violating the New Jersey "Right to Know Law", N.J.S.A. 47:1A-1 *et seq.*, and the Common Law right to know

38. Incorporated by reference are paragraphs 1 to 37 of this Complaint.

39. Landowner was forced to connect to the Town's sewers because of illegalities during the Municipal Proceedings. This included *ex parte* side-bar conversations in open-court between the Municipal Judge, Prosecutor, Mr. Felter, and Township Administrator Barbara Pence. The Municipal judge called Mr. Felter and the prosecutor to the side of his bench. Landowner was not permitted to join the side-bar conversations. Landowner could hear that they were talking but could not make-out the details of the *ex parte* side-bar conversations. In addition, at the end of the second municipal hearing, the Judge called Township Administrator Barbara Pence forward to speak with him about the case. Tapes were ordered of the hearing to disclose the extent of the *ex parte* side-bar conversations between the Municipal Judge and Mr. Felter and the Municipal Judge and Barbara Pence. The municipal court refused to provide a copy of the hearing on January 30, 1996, Township of Bernards v. Barth, C-2161

40. Under New Jersey law, the *ex parte* conversations between a Municipal Judge and Township Officials in open court, precluding the defendant, is proof of unfairness. It is fundamentally understood that a judge is required to consider only sworn testimony that is subject to cross-examination. Township officials are not permitted to control the decision of a municipal proceeding.

41. The Bernards Township Municipal Court refused to provide plaintiff with a complete copy of a tape recording of a Municipal Court hearing but had portions deleted from the copy provided to the landowner.

42. Plaintiff has standing to assert an extensive right to obtain a copy of public records of the tape recording of the municipal hearing. The public record bears upon the problems raised in the instant complaint.

Under the New Jersey "Right to Know Law", N.J.S.A. 47:1A-1 *et seq.*, and the Common Law right to know, the plaintiff is entitled to a copy of the Court proceedings. The Bernards Township Municipal Court is liable violating the New Jersey "Right to Know Law", N.J.S.A. 47:1A-1 *et seq.*, and the Common Law right to know.

Counts XXXIII-LXIII - Fraud; Malicious and Tortious Interference with a Contractual Relationship; Malicious Prosecution; Abuse of Process; Negligence; Conspiracy to Violate 42 U.S.C. 1985 and violation of rights protected by 18 U.S.C. §§ 1961 *et. seq* (RICO).

43. Incorporated by reference are paragraphs 1 to 42 of this Complaint.

44. Because of this malicious and arbitrary treatment, the ordinance is not only unconstitutional, but Bernards Township, the Bernards Township Board of Health, the Bernards Township Sewerage Authority, J. Knox Felter, Jr., Barbara J. Pence, are liable for Fraud, Malicious and Tortious Interference with a Contractual Relationship, Malicious Prosecution, Abuse of Process, Negligence, and Conspiracy to Violate plaintiff's rights protected by 42 U.S.C. § 1985 (Civil Rights) and 18 U.S.C. §§ 1961 *et. seq.*

Counts LXIV-LXVII - Sewer Tax is Unconstitutional and violates Uniformity Clauses of Article 8 of the N.J. Constitution, Article I of the U.S. Constitution, and the Due Process Clause of the Fifth Amendment.

45. Incorporated by reference are paragraphs 1 to 44 of this Complaint.

46. The sewer connection requirement infringed on landowners federal rights. There is no rational basis for the collection of the Sewer Tax. It is an unreasonable and arbitrary imposition. The collection of the tax is irrational and arbitrary since the same township can force someone to connect or disconnect to and from the sewers. Moreover, the Sewer authority claims it does not have to indemnify homeowners from back-ups. Accordingly, the requirements

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for the enforcement of the sewer tax are arbitrary and unconstitutional.

47. The tax is not uniform in the Township, the County or the State of New Jersey. Accordingly the sewer tax violates the Uniformity Clauses of Article 8 of the N.J. Constitution, Article I of the United States Constitution, and the Due Process Clause of the Fifth Amendment.

Count XLVIII - New Jersey Tort Claims Act N.J.S.A. 59:1-1.

48. Incorporated by reference are paragraphs 1 to 47 of this Complaint.

49. Bernards Township, the Bernards Township Board of Health, the Bernards Township Sewerage Authority, J. Knox Felter, Jr., Barbara J. Pence, are liable for violating the N.J. Tort Claims Act N.J.S.A. 59:1-1 *et seq.*

Counts XLIX-L - PSE&G Liable for Violating Federal Natural Gas Pipeline Safety Act

50. Incorporated by reference are paragraphs 1 to 49 of this Complaint.

51. On or about August 3, 1993, PSE&G contractors installed a "temporary gas line" on the street over the bridge adjacent to the southwest corner of plaintiff's property. PSE&G was required to construct this pipeline in accordance with the Minimum Federal Safety Standards of the U.S. Department of Transportation as published in Part 192 of Title 49, Code of Federal Regulations, and any amendments thereof. PSE&G did not construct the pipeline in accordance with these rules. The pipe was laid on the deck of the bridge and has been paved over with no other protection. Beams for a guard rail have been driven into the ground inches from the pipeline. PSE&G has created a public safety hazard.

52. 49 App. § 60101 *et. seq.* states that it is a violation of Federal Law to construct a gas pipeline in violation of Federal Regulations.

49 App. §60121 states that citizens may commence a civil action for relief against any person violation this chapter.

53. Therefore, PSE&G, in constructing a pipeline in violation of Federal Law, is liable for violating the Natural Gas Pipeline Safety Act for $10,000 a day from August 3, 1993 or $500,000.

Count L - PSE&G Liable for Violating the New Jersey Natural Gas Pipeline Safety Act

54. Incorporated by reference are paragraphs 1 to 53 of this Complaint.

55. N.J.S.A. 48:9-33 provides that it is a violation of State law to construct a natural gas pipeline that violates federal standards. The purpose of the law is to bring New Jersey into compliance with federal safety regulations.

56. Therefore, PSE&G, in constructing a pipeline in violation of Federal Law, is liable to the landowner for violating the New Jersey Natural Gas Pipeline Safety Act in the amount of $10,000 a day from August 3, 1993 or $500,000.

Counts LI-LIII - N.J. Eminent Domain Statute N.J.S.A. 20 *et. seq* is Unconstitutional and Violates Property Rights Protected by the Fifth and Fourteenth Amendments

57. Incorporated by reference are paragraphs 1 to 48 of this Complaint.

58. On March 27, 1997, PSE&G has filed suit in Superior Court, New Jersey, to exercise Eminent Domain over plaintiff's property. Public Service Electric and Gas Company v. Barth, *et. als.* SOM-L-549-97. It is expected that the Superior Court case will be dismissed.

59. Landowner has a constitutionally protected right in his property. The condemnation filed by PSE&G effects that property right.

60. Pursuant to statute, a utility easement is an easement appurtenant. As a matter of law, an easement appurtenant must be excluded from the calculation of a minimum lot size. Excluding the proposed condemnation area, technically a variance is required for one subdivided lot. As a matter of law, if a variance is required, the taking is as if the variance would not be granted. This is regardless of whether or not a variance is granted.

61. Once a taking is effected, Landowner is required to expend additional sums of money for engineering and other costs for the purpose of acquiring a subdivision.

62. A fundamental purpose of the N.J. Eminent Domain statute is fairness to the landowner. If a fact finder determines that the Utility has not acted fairly or in good faith, the Utility Company's petition to condemn is denied.

63. Both New Jersey and the Federal Court's recognize the right to be heard in one proceeding. However, the N.J. eminent Domain Statute does not provide the opportunity to be heard in one forum.

64. The New Jersey Office of Administrative Law jurisdiction is limited to that portion of PSE&G's original petition related to the eminent domain statute. The OAL does not have jurisdiction to hear any of landowner's Federal or state claims or counter-claims. (This includes violation of the Federal Natural Gas Pipeline Safety Act.) There is no forum where all claims arising out of the same transaction can be heard. As a result, the landowner is subject to three (3) separate trials to resolve all claims arising out of a common nucleus of operative facts.

65. The OAL is required to determine whether the utility company acted within the standards as set forth by the NJ Eminent Domain statute. However, the fact-finder can more clearly determine the fact that PSE&G did not meet those standards by examining the landowner's claims against PSE&G.

66. Therefore, the N.J. Eminent Domain N.J.S.A. 20 *et. seq* is unconstitutional and violates landowner's Constitutional rights as

protected by the Fourteenth and Fifth Amendments of the United States Constitution.

Counts LIV-LVI - PSE&G Liable For Trespass - Destruction of Trees

67. Incorporated by reference are paragraphs 1 to 66 of this Complaint.

68. During the Winter of 1993, on or about December 15, 1993, and during the summer of 1993, at a date unknown, PSE&G did trespass upon the premises of the landowner by their agents, servants and employees or by themselves brought or caused to be brought vehicles, machines and equipment upon the property of landowner, and did destroy and damage or did cause to be destroyed and damaged trees growing on the property of the landowner and did otherwise damage same.

69. The trees damaged and destroyed by PSE&G or by their agents, servants, and employees were of great inherent value, aesthetic value and of great value as an integral part of the architectural design plan of the landowner.

70. In addition to the damages set forth above, landowner will be in the future, obliged to spend large sums of money to attempt to replace the trees damaged and destroyed by PSE&G.

71. Therefore, PSE&G is liable for trespass and destruction of trees.

Count LVII - PSE&G liable for Breach of Contract

72. Incorporated by reference are paragraphs 1 to 71 of this Complaint.

73. On June 28, 1993, PSE&G and landowner entered into an agreement that, *inter alia*, promised to reimburse and indemnify landowner for property damage. Landowner filed a claim for destruction of trees. PSE&G has not honored this request but requires the landowner to pursue the matter with their subcontractor's

insurance company. It is the position of PSE&G's subcontractor insurer that PSE&G is liable to the landowner. This is clearly not indemnification by PSE&G. As a public utility, PSE&G is acted tortiously in failing to honor a contract with a member of the public. In doing so, PSE&G is liable for breach of contract.

Count LVIII - PSE&G Liable For Trespass to Land

74. Incorporated by reference are paragraphs 1 to 73 of this Complaint.

75. An appraiser for PSE&G certified in his appraisal that on February 4, 1994 he entered upon said property. This entry was without permission and took place well after the termination of the six (6) month contract with PSE&G.

76. Therefore, since no PSE&G agents, subcontractors, etc. had authority to come onto said land after the termination of the contract, PSE&G is liable for trespass.

Count LIX - PSE&G Liable for Negligence

77. Incorporated by reference are paragraphs 1 to 76 of this Complaint.

78. PSE&G stated it would indemnify landowner from all damages of its agents, subcontractors, etc. PSE&G agents and subcontractors, etc. acted reckless, willful and wanton in trespassing upon landowner's property and damaging trees. In doing so, PSE&G agents, contractors, etc. are liable for negligence. PSE&G therefore, is vicariously liable for negligence.

Count LX - PSE&G Liable for Bad Faith

79. Incorporated by reference are paragraphs 1 to 78 of this Complaint.

80. Within every contract is the implied duty of good faith and fair dealing. PSE&G refused in bad faith to settle the claim regarding

their subcontractors damage to trees. The indemnification of landowner was covered by the contract that PSE&G signed. This delay by PSE&G constitutes a tort of bad faith and is also punishable by the award of punitive damages.

Count LXI - PSE&G Liable for Waste

81. Incorporated by reference are paragraphs 1 to 80 of this Complaint.

82. PSE&G its agents, subcontractors, etc. had a duty to preserve the nature of landowner's property. PSE&G its agents, subcontractors, etc. breached that duty by recklessly damaging trees on plaintiff's land. In doing so, PSE&G is negligent *per se* and liable for waste.

Counts LXII - LXIV N.J.S.A. 13:9B-1 *et seq.* (Freshwater Wetlands Protection Act) and N.J.A.C. 7:7A-1 *et seq* (Freshwater Wetlands Protection Act Rules) is Unconstitutional

83. Incorporated by reference are paragraphs 1 to 82 of this Complaint.

84. The New Jersey Department of Environmental Protection ruled that the wetlands on landowner's property were of the most minimal resource value. Accordingly, they granted PSE&G a stream encroachment permit for that portion crossing plaintiff's property. In reliance on that most minimal classification, at substantial expense, plaintiff obtained planning board approval for the zoning of plaintiff's property for the raising and keeping of horses. This included the construction of a large corral. Plaintiff also incurred substantial expense to subdivide the property.

85. Subsequent to that ruling, the NJ DEP ruled that some wetlands on landowner's property were of exceptional value. The NJDEP refuses to clarify the differences in the wetlands but threatens landowner. The DEP requires that plaintiff obtain a formal delineation of the wetlands on plaintiff's property. However, the DEP refuses to require PSE&G to obtain a formal delineation to review whether the same modification affected the wetlands that PSE&G

intended to destroy of that portion of plaintiff's property PSE&G sought to condemn. The portions are contiguous.

86. Because of the arbitrary and capricious conduct of the NJDEP, N.J.S.A. 13:9B-1 *et. seq* and its rules N.J.A.C. 7:7A-1 *et. seq* are unconstitutional and violated the Fifth and Fourteenth Amendment, and the New Jersey Constitution.

Counts LXV-LXVIII - N.J. D.E.P. Violated Plaintiff's Rights Protected by the Fifth and Fourteenth Amendments; 42 U.S.C. § 1983, and Article I of the N.J. Constitution.

87. Incorporated by reference are paragraphs 1 to 86 of this Complaint.

88. The New Jersey Department of Environmental Protection and its Commissioners are liable for violating plaintiff rights protected under the Fifth and Fourteenth Amendments of the United States Constitution, 42 U.S.C. § 1983 and Article I of the New Jersey Constitution.

Counts LIX- LXX A.D. Runyon Co. liable for Breach of Contract, Negligence and N.J. Consumer Fraud Act N.J.S.A. 56:8-19 *et. seq.*

89. Incorporated by reference are paragraphs 1 to 88 of this Complaint.

90. Runyon Company has brought a frivolous suit against Plaintiff in the Special civil Part, Superior Court of New Jersey. It is expected the matter will be dismissed.

91. Runyon Company was requested to put only 100 gallons of oil in landowner's oil tank since the oil tank had to be relocated because Bernards Township illegally and unconstitutionally forced the connection of plaintiff's property to the Township sewer line. A.D. Runyon Company agreed to the terms of delivery only 100 gallons of oil. Instead Runyon Oil filled the tank in breach of the contract. As a result, the oil tank could not be relocated during the construction project to connect plaintiff's property to the Townships sewers. The

negligence of A.D. Runyon Company materially and detrimentally affected the project to connect plaintiff's property to the Township Sewer lines.

92. Runyon Oil Co. performed "repairs" on landowner's oil furnace. The furnace developed problems that resulted from the previous poor service performed by A.D. Runyon Company. Moreover, A.D. Runyon Company refused to apply its own published discount coupons against landowner's bill.

93. Accordingly, because of its unlawful practices, Runyon Oil is liable for breach of contract, negligence and for violating the N.J. Consumer Fraud Act N.J.S.A. 56:8-19 *et. seq.*.

Counts LXXI-LXXII Harry P. Beldon liable for libel and filing a frivolous lawsuit.

94. Incorporated by reference are paragraphs 1 to 93 of this Complaint.

95. Plaintiff made an written offer to settle a dispute between plaintiff and A. D. Runyon Company through their attorney Harry P. Beldon. Plaintiff never received a response from Mr. Beldon until a year later when Mr. Beldon sent landowner a defamatory letter indicating that the landowner had spoken with Mr. Beldon and agreed to certain terms. The letter was false and intended to place landowner in a false light, that is, not a person of his word. Mr. Beldon misled his client that resulted in the filing of a frivolous lawsuit. Accordingly, Mr. Beldon is liable for libel and filing a frivolous lawsuit.

Counts LXXIII-LXXV N.J. Court Rule 4:30A ("Entire Controversy Doctrine") violates Articles III, § 2 and Article IV § 1 of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment.

96. Incorporated by reference are paragraphs 1 to 95 of this Complaint.

97. The New Jersey Entire Controversy Doctrine is unconstitutional. The Doctrine violates Article III, § 2 of the United States Constitution which authorizes federal courts to decide only "cases" or "controversies." It also violates Article IV § 1 of the Constitution which states that "full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other States; And the Congress may be general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." It also violates the Due Process Clause of the Fourteenth Amendment.

98. The Doctrine is unconstitutional in that it fosters uncertainty in an area of law that must remain clear. The doctrine is overly burdensome and the application too arbitrary, particularly when someone attempts to exhaust administrative remedies. The Doctrine basically requires someone to bring cases that have not yet ripened. Accordingly, the Doctrine should be declared unconstitutional under Articles III, § 2 and Article IV § 1 of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment.

RELIEF REQUESTED

WHEREFORE, landowner demands this Court enter judgment on his behalf as follows:

1. Declaratory judgment in favor of landowner on all counts one through seventy five.

2. Injunctive relief in favor of landowner including the following: Order PSE&G to remove a temporary natural gas pipeline that was installed adjacent to plaintiff's property in violation of the Federal and New Jersey Pipeline Safety Acts; enjoin the Tax Sale of plaintiff's property located at Block 133 Lot 4 in Bernards Township; Order Bernards Township to remove storm pipes illegally placed under plaintiff's property; Order Bernards Township Municipal Court to produce a copy of a tape recordings of a Municipal Court hearing, January 30, 1996 Docket C-2161; Order Bernards Township to remove the underground flooding of plaintiff's property caused by their improperly constructed storm sewers; Order Bernards Township

to correct the flooding condition they caused that results in water to running off the street in front of plaintiff's proper down plaintiff's driveway; Order Bernards Township to remove the elevated road that is causing flooding on plaintiff's property; and Order the New Jersey Department of Environmental Protection Agency to produce a copy of a report indicating they admitted states that Bernards Township illegally raised the level of a road in a flood plain causing additional flooding of plaintiff's property. NJ Dep. File No. 02-010-96.

3. Compensatory, punitive, exemplary and treble damages on Counts one through forty-eight against the Township of Bernards, Bernards Township Sewage Authority, Bernards Township Board of Health, Bernards Township Municipal Court, J. Knox Felter, Jr., Senior Sanitarian, Bernards Township, Peter A. Messina, P.E., P.P. Township Engineer/Planner, Peggy Warren, Certified Tax Collector, Bernards Township, Barbara Pence Township Administrator, and J. Doe(s), individually and in their official capacities; in an amount not less than $19,000,000.

4. Compensatory, punitive or exemplary damages on Counts forty-nine through sixty-one against PSE&G in an amount not less than $13,000,000.

5. Compensatory, punitive or exemplary damages on Counts sixty-two through sixty-eight against the New Jersey Department of Environmental Commission in an amount not less than $15,000,000.

6. Compensatory, punitive or exemplary damages on Counts sixty-nine through seventy two against A.D. Runyon Company and Harry P. Beldon, Attorney at Law, in an amount not less than $295,000.

7. Such other and further relief as this Court may deem proper and necessary.

8. Severance of any future claims including those against the United States Internal Revenue Service and the New Jersey Department of Transportation, and any other claims unaccrued at this time.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury on all triable issues of the complaint.

Respectfully submitted,

Dated: New Jersey
April 15, 1997

Michael Barth
P.O. Box 315
Liberty Corner,
New Jersey 07938

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APPENDIX
PA

1. Notice of Appeal and Certification of Service filed 3/23/1999.

3. Order February 22, 1999 granting PSE&G and Township defendants summary judgment; granting state defendants judgment on the pleadings; and denying plaintiff's motion to strike defendant's answers, to find defendants in contempt, default, costs and fees, extend time for discovery, and leave to file amended complaint.

5. Inaction of Judge Thompson to act upon plaintiff's request of September 14, 1998 for injunction relief against PSE&G and Bernards Township Police Department.

11. Order October 23, 1996 vacating default against PSE&G, Bernards Township Sewage Authority, denying plaintiff's motion to strike answers of PSE&G, default judgment against PSE&G and Bernards Township Sewage Authority, default against certain laws and ordinances; and permitting Bernards Township Sewage Authority to file an answer.

13. Order December 5, 1997 denying plaintiff's motion for reconsideration of the October 23, 1996 order; plaintiff's request for certification for appeal of the October 23, 1996 Order and stay of the October 23, 1996 Order pending appeal.

16. Order May, 6, 1997 denying plaintiff's request for order to show cause: PSE&G, enjoin Tax sale; access municipal court tapes, correct flooding, and access to N.J. D.E.P. report.

19. Order June 18, 1996 denying plaintiff's order to show cause for a preliminary injunction and a temporary restraining order: stay state court actions and transfer back to Newark.

21. Certificate of Clerk, September 18, 1997 not entering default.

22. Order November 30, 1998 denying plaintiff's motion for order to Bernards Township Planning Board to show cause.

23. Letter filed July 14, 1997 where Judge Thompson refused to recuse herself.

24. Opinion filed February 22, 1999.

51. Docket Entries.

66. Complaint filed April 17, 1997.

82. Default entered August 22, 1997 PSE&G and Bernards Township Sewage Authority failed to plead.

83. Summons dated December 5, 1995, Bernards Township filed suit against Barth in Bernards Township Municipal Court. Municipal Court Docket No. 1372.

84. Letter dated March 6, 1997, Bernards Township plans to sell Barth's property in a tax sale.

85. Summons dated March 25, 1997, A.D. Runyon Company, filed complaint against Barth, in Superior Court of New Jersey, Law Division, Special Civil Part. Docket 979-97.

87. Order to Show Cause dated March 26, 1997, PSE&G filed suit against Barth, in Superior Court of New Jersey, Law Division. Docket SOM-L-549-97.

89. Order dismissing PSE&G 's complaint against Mr. Barth - N.J. Superior Court 6-13-97.

91. Stipulation of Dismissal Runyon Company v. Barth, filed in Superior Court of N.J. on June 26, 1997, Docket 979-97.

93. Freda L. Wolfson, United States Magistrate Judge, Order of October 22, 1998 that discovery not stayed and that interrogatories served and answers due prior to the date on which a motion for summary judgment was filed must be answered.

95. Police Report 7-15-94 PSE&G rupture gas main adjacent Mr. Barth.

96. Letter march 24, 1999 Bernards Township underground pump 28,000 gallons adjacent Mr. Barth property.

98. Counsel Yurasko admit not move to dismiss RICO claims, Brief dated 11/24/98.

99. PSE&G stream crossing permit over Mr. Barth's property based on minimal wetlands classification.

101. NJ DEPE mandatory disclosure PSE&G stream crossing permit and notice PSE&G construction start December 6, [1993].

104. NJ DEPE Modify wetlands Barth's use November 17, 1995 but not for PSE&G use.

105. Support Order to show cause enjoin Planning Board approve increased flooding and construction of mammoth septic field on property within 200 feet of plaintiff's property.

113. Photo's PSE&G violate pipeline safety acts.

114. Letter to Bernards Township related to flooding of Mr. Barth's property.

115. Certification of Service.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I

Section 8. The Congress shall have the Power to lay and collect taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Article III

Section 2. the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;
Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XI [1795]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

Amendment XIV {1868)

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. 1503. Influencing or injuring officer or juror generally - (a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case. (b) The punishment for an offense under this section is - (1) in the case of a killing, the punishment provided in sections 1111 and 1112; (2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a

fine under this title, or both; and (3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C. 1961 As used in this chapter - (1) "racketeering activity" means (A) any act or threatinvolving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual

exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain.
(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof; (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property; (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity; (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; (6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to

principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate; (7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter; (8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter; (9) "documentary material" includes any book, paper, document, record, recording, or other material; and (10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. Sec. 1962. Prohibited activities (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer. (b) It shall be unlawful for any person through a pattern of

racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

42 U.S.C. 1983. Civil action for deprivation of rights - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Sec. 1985. Conspiracy to interfere with civil rights (1) Preventing officer from performing duties If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties; (2) Obstructing justice; intimidating party, witness, or juror If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any

such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; (3) Depriving persons of rights or privileges If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

TITLE 42 - THE PUBLIC HEALTH AND WELFARE - NATIONAL FLOOD INSURANCE

42 U.S.C. Sec. 4001. Congressional findings and declaration of purpose (a) Necessity and reasons for flood insurance program The Congress finds that (1) from time to time flood disasters have created personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources; (2) despite the installation of preventive and protective works and the adoption of other public programs designed to reduce losses caused by flood damage, these methods have not been sufficient to protect adequately against growing exposure to future flood losses; (3) as a matter of national policy, a reasonable method of sharing the risk of flood losses is through a program of flood insurance which can complement and encourage

preventive and protective measures; and (4) if such a program is initiated and carried out gradually, it can be expanded as knowledge is gained and experience is appraised, thus eventually making flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection. (b) Participation of Federal Government in flood insurance program carried out by private insurance industry The Congress also finds that (1) many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions; but (2) a program of flood insurance with large-scale participation of the Federal Government and carried out to the maximum extent practicable by the private insurance industry is feasible and can be initiated. (c) Unified national program for flood plain management The Congress further finds that (1) a program of flood insurance can promote the public interest by providing appropriate protection against the perils of flood losses and encouraging sound land use by minimizing exposure of property to flood losses; and (2) the objectives of a flood insurance program should be integrally related to a unified national program for flood plain managementand, to this end, it is the sense of Congress that within two years following the effective date of this chapter the President should transmit to the Congress for its consideration any further proposals necessary for such a unified program, including proposals for the allocation of costs among beneficiaries of flood protection.

(d) Authorization of flood insurance program; flexibility in program It is therefore the purpose of this chapter to (1) authorize a flood insurance program by means of which flood insurance, over a period of time, can be made available on a nationwide basis through the cooperative efforts of the Federal Government and the private insurance industry, and (2) provide flexibility in the program so that such flood insurance may be based on workable methods of pooling risks, minimizing costs, and distributing burdens equitably among those who will be protected by flood insurance and the general public.

(e) Land use adjustments by State and local governments; development of proposed future construction; assistance of lending and credit institutions; relation of Federal assistance to all flood-related programs; continuing studies It is the further purpose of this chapter to (1) encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses, (2) guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards, (3) encourage lending and credit institutions, as a matter of national policy, to assist in furthering the objectives of the flood insurance program, (4) assure that any Federal assistance provided

under the program will be related closely to all flood-related programs and activities of the Federal Government, and (5) authorize continuing studies of flood hazards in order to provide for a constant reappraisal of the flood insurance program and its effect on land use requirements.
(f) Mudslides The Congress also finds that (1) the damage and loss which results from mudslides is related in cause and similar in effect to that which results directly from storms, deluges, overflowing waters, and other forms of flooding, and (2) the problems involved in providing protection against this damage and loss, and the possibilities for making such protection available through a Federal or federally sponsored program, are similar to those which exist in connection with efforts to provide protection against damage and loss caused by such other forms of flooding. It is therefore the further purpose of this chapter to make available, by means of the methods, procedures, and instrumentalities which are otherwise established or available under this chapter for purposes of the flood insurance program, protection against damage and loss resulting from mudslides that are caused by accumulations of water on or under the ground.

49 U.S.C. Sec. 60118. Compliance and waivers (a) General Requirements. - A person owning or operating a pipeline facility shall -(1) comply with applicable safety standards prescribed underthis chapter, except as provided in this section or in section 60126;
the Secretary shall provide a prompt opportunity for a hearing.
The Secretary shall make the final decision on granting the waiver.

49 U.S.C. Sec. 60121. Actions by private persons (a) General Authority. - (1) A person may bring a civil action in an appropriate district court of the United States for an injunction against another person (including the United States Government and other governmental authorities to the extent permitted under the 11th amendment to the Constitution) for a violation of this chapter or a regulation prescribed or order issued under this chapter....

Supreme Court, U.S.
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No. 99-1098

IN THE

Supreme Court of the United States

MICHAEL BARTH,

Petitioner,

v.

PUBLIC SERVICE ELECTRIC AND GAS; TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY; BERNARDS TOWNSHIP BOARD OF HEALTH; BERNARDS TOWNSHIP MUNICIPAL COURT; J. KNOX FELTER, JR., Senior Sanitarian, Bernards Township; PETER MESSINA, P.E., P.P., Township Engineer/Planner; PEGGY WARREN, Certified Tax Collector, Bernards Township; BARBARA J. PENCE, Township Administrator; J. DOE(S), individually and in their official capacities; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS, and various New Jersey State Statutes; A.D. RUNYON OIL COMPANY; HARRY P. BELDON, Attorney at Law,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT TOWNSHIP OF BERNARDS BRIEF IN OPPOSITION ON THE INVERSE CONDEMNATION CLAIM SEWER TAX UNIFORMITY CLAIM

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QUESTION PRESENTED

1. As to the Respondent, Township of Bernards, whether Petitioner must exhaust state remedies before bringing an inverse condemnation action in Federal Court against a municipality in New Jersey?

2. Whether there is any basis for a claim against a local sewer tax on uniformity issues?

(It should be noted that these questions involve the Township of Bernards as represented by George A. Mauro, Jr., Esq., of Mauro, Savo, Camerino & Grant, P.A. Any other questions involving the Township of Bernards will be addressed in a separate brief through other counsel. Other questions not affecting the Township of Bernards will be addressed by other Respondents.)

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Petitioner's Appendix contains the opinions below that address the inverse condemnation issue and sewer tax issue as they relate to Respondent Township of Bernards. Specifically, the opinion of the Court of Appeals of the Third Circuit, No. 99-5190, at page A2 of Petitioner's Appendix, and the opinion of the United States District Court for the District of New Jersey, Civil No. 97-2163, at page B1 of Petitioner's Appendix. These opinions are unreported.

STATEMENT OF JURISDICTION

Jurisdiction is pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Regarding the inverse condemnation issue; United States Constitution, Fifth Amendment, taking clause; New Jersey Constitution, Article 1, Paragraph 20; N.J.S.A. 20:3-29; 20:3-30 (sections of eminent domain state statute). The sewer tax issue involves the New Jersey Constitution, Article 8, Section 1, Paragraph 1(a) and the United States Constitution, Article I, Section 8, Clause 1.

Article 1, Paragraph 20 of the New Jersey Constitution provides:

> Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

N.J.S.A. 20:3-29 provides:

> The condemnee shall be entitled to compensation for the property, and damages, if any, to any remaining property, together with such additional compensation as provided for herein, or as may be fixed according to law.

N.J.S.A. 20:3-30 provides:

> Just compensation shall be determined as of the date of the earliest of the following events: (a) the date possession of the property being condemned is taken by the condemnor in whole or in part; (b) the date of the commencement of the action; (c) the date on which action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee.

Article 8, Section 1, Paragraph 1(a) of the New Jersey Constitution provides:

> 1. (a) Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.

STATEMENT OF THE CASE

The Respondent Township of Bernards has been represented by two counsel in this matter, one for various damages claims, and herein on the inverse condemnation claim which will be addressed in this brief.

Petitioner alleged that a public road bordering his property was regraded, changing the elevation, and that this resulted in water runoff onto his property. Petitioner also alleged that a stormwater drainage system was constructed without catch basins, which also contributed to flooding on his property. He also alleged that the Township of Bernards installed pipes on his property. He contended that an unconstitutional taking without compensation had occurred. The Petition at pages five and six makes these allegations.

There is nothing in the record to indicate any action by Petitioner in state court seeking compensation for inverse condemnation, nor any other type of condemnation or eminent domain proceeding in State Court involving Petitioner and Respondent Township of Bernards.

Petitioner's inverse condemnation claim was dismissed based upon the decision that the District Court had no subject matter jurisdiction over a Fifth Amendment taking claim until the property owner has utilized the state procedure and been denied compensation. The District Court also held it had no jurisdiction to supercede state jurisdiction in condemnation procedures under the State Constitution and law.

The sewer tax issue is a claim of violation of Federal and State tax on uniformity constitutional provisions, United States Constitution, Article I, Section 8, Clause 1 and the

New Jersey Constitution, Article 8, Section 1. Petitioner has presented no cognizant support or arguments for this claim.

Petitioner's arguments for proceeding initially in Federal Court have not addressed the applicable law.

REASONS FOR DENYING THE WRIT

Petitioner's application for a writ of certiorari should be denied on the inverse condemnation and sewer tax claims against Respondent Township of Bernards under Rule 10 of the Supreme Court Rules for the following reasons:

1. The Third Circuit affirmed the District Court's granting of summary judgment in favor of the Township of Bernards, applying accepted and usual standards under F.R.C.P. 56, where as a matter of law, a property owner must exhaust available state remedies before bringing an inverse condemnation action in Federal Court, requiring no need for an exercise of the Supreme Court's power of supervision. Rule 10(a).

2. The decision of the Third Circuit was not in conflict with the decisions of other United States Court of Appeals and applied accepted law and methodology, requiring no need for the Supreme Court's power of supervision. Rule 10(a).

3. The Third Circuit has decided the issue of exhaustion of state remedies in an inverse condemnation claim in a manner consistent with existing precedent and accepted methodology and not in conflict with applicable decisions of the Supreme Court, requiring no need for the Supreme Court to settle an important issue of federal law. Rule 10(c).

4. The sewer tax claim presents no viable issue requiring the need for an exercise of the Supreme Court's power as supervision. Rule 10(a).

SUMMARY OF ARGUMENT

1. The applicable law is stated in *Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-97, 87 L. Ed. 2d 126, 143-46, 105 S. Ct. 3108 (1985) and *Suitim v. Tahoe Regional Planning Agency*, 520 U.S. 725, 137 L. Ed. 2d 980, 117 S. Ct. 1659, 1665 (1997). The accepted law indicates that before there can be a federal court review of a taking claim, the property owner must make an unsuccessful effort to obtain compensation in state court or show the unavailability of such a remedy. A remedy was available to Petitioner, but he never made any effort to invoke that remedy. No constitutional, Federal or State, violations based upon tax uniformity claims have been shown regarding the sewer tax.

ARGUMENT

I. THE INVERSE CONDEMNATION CLAIMS WERE PROPERLY DISMISSED FOR FAILURE TO EXHAUST STATE REMEDIES AND THE SEWER TAX CLAIMS WERE UNSUPPORTED AND FURTHER REVIEW OF THE THIRD CIRCUIT AFFIRMANCE IS NOT WARRANTED.

Jurisdiction to the Third Circuit was pursuant to 28 U.S.C. § 1291, appeal from final decisions of the District Court.

The Petition and the Petitioner's arguments below, a pro se presentation, is somewhat confusing and not on point with the applicable law. This brief will focus solely upon the inverse condemnation issue and sewer tax issues.

The record has no indication that Petitioner has made an unsuccessful effort to obtain taking compensation in state court or that there is an unavailability of such remedy. An action for federal review of a taking claim requires an unsuccessful effort to obtain compensation in state court or the unavailability of such a remedy. *Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-97, 87 L. Ed. 2d 126, 143-46, 105 S. Ct. 3108 (1985); *Stern v. Halligan*, 158 F.3d 729, 734 (3d Cir. 1998). In *Suitim v. Tahoe Regional Planning Agency*, 520 U.S. 725, 137 L. Ed. 2d 980, 117 S. Ct. 1659, 1665 (1997) the Supreme Court noted:

> if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation

> Clause until it has used the procedure and been denied just compensation. (citation omitted)

This principle has been stated in additional precedent. In *Bloomsberg Landlords Assoc., Inc. v. Town of Bloomsberg*, 912 F. Supp. 790, 805-06 (M.D. Pa. 1995) the court indicated:

> If a state provides an adequate procedure for seeking compensation
>
> * * *
>
> . . . the property owner cannot claim a Fifth Amendment violation until the owner has invoked that procedure and been denied just compensation.
>
> The state's action is not complete in the sense of causing a constitutional injury unless or until the state fails to provide an adequate post deprivation remedy for the property loss. . . . Numerous decisions . . . have reached the same result, dismissing as not ripe for federal adjudication claims not first presented to the state courts. . . .

New Jersey provides a state remedy for a taking without just compensation, including inverse condemnation actions. N.J. Const. Art. 1, Sec. 20; *Pappas v. Bd. Of Adjustment*, 254 N.J. Super. 52, 56, 603 A.2d 65 (App. Div. 1992), *certif. den.*, 130 N.J. 9, 611 A.2d 648 (1992); *Morris Hills Land v. Parsippany-Troy Hills*, 40 N.J. 539, 557, 193 A.2d 232 (1963); *Matter of Jersey Central Power & Light*, 166 N.J. Super. 540, 400 A.2d 178 (App. Div. 1979). Federal precedent has recognized that New Jersey has such a remedy for claims of a taking without just compensation.

> . . . the Eminent Domain Statute *N.J.S.A.* 20:3-1 et. seq. also provides an appropriate post-deprivation remedy. This clearly seems to be the case. Although the statute itself does not explicitly cover inverse condemnation actions, . . . the New Jersey Courts have stated that an aggrieved landowner may bring a mandamus action to compel institution of condemnation proceedings. . . .

Cuzzupe v. Paparone Realty Co., 596 F. Supp. 988, 990 (D.N.J. 1984).

On this record, therefore, Petitioner did not present an inverse condemnation claim ripe for consideration in federal court and there was no jurisdiction on that issue. There was no genuine issue of material fact in dispute on that issue, and Petitioner Township of Bernards was entitled to a judgment as a matter of law. Summary judgment, therefore, was properly granted dismissing all of the claims alleging an unconstitutional taking in violation of federal law made against the Township of Bernards. F.R.C.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), and the District Court decision was properly affirmed on that issue by the Third Circuit.

Petitioner also raised an allegation of a taking without just compensation under state law. The argument, *supra*, concerning the allegations made on this issue under federal law, that is, failure to exhaust state remedies, appears equally applicable with similar claims under state law. If Federal Courts will decline to address Federal Constitutional claims of a taking without just compensation by state and local public entity defendants for failure to exhaust state remedies,

it reasonably follows that a Federal Court should not address similar claims under state law under supplemental jurisdiction, until the state law remedies are also exhausted.

Petitioner's contention that New Jersey does not have an adequate eminent domain procedure, discussed at pages 22 and 23 of the Petition, is simply not supported and contradicts the conclusions of both state and federal courts on this issue within the jurisdiction involved.

Petitioner's citation of *Patsy v. Florida Board of Regents*, 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1976) for a proposition that exhaustion of state remedies is not required, have no application to taking claims raised under the Fifth Amendment, and refers only to 42 U.S.C. § 1983 claims.

Petitioner raises an issue of the constitutionality of a municipal sewer tax on grounds of uniformity, but cites no precedent for such a challenge. The decisions below (B19; A2) pointed out that the *United States Constitution*, Article I, Section 8, Clause 1 dealing with uniformity of taxation has no application to municipal taxation. With regard to uniformity under the New Jersey Constitution, Article 8, Section 1, the courts below pointed out that no evidence was presented that the tax is not assessed according to property value, thus being uniform. *See Cooper Hosp. v. City of Camden*, 68 N.J.L. 691, 694, 54 Atl. 419 (E & A 1903); *State v. Mayor of City of Paterson*, 49 N.J.L. 380, 8 Atl. 113 (Sup. Ct. 1887). Further, the courts below also ruled that acceptable adequate state remedies made a due process claim meritless. *See General Motors Corp. v. City of Linden*, 143 N.J. 336, 348-50, 671 A.2d 560 (1996), *cert. den.* 117 S. Ct. 66 (1996).

Accordingly, there is no reason to grant the Petition on the inverse condemnation issue or sewer tax issue. The Third Circuit's decision is consistent with Supreme Court opinions and the actual status of state law.

II. PETITIONER'S FACTUAL MISREPRESENTATIONS

With regard to the inverse condemnation issue, Petitioner states, at page 27 of the Petition, that defendants admit summary judgment should have been entered against themselves, and that they entered his property. The record does not admit that there was any taking as a factual matter. Petitioner's representation in that regard are not supported by this record.

CONCLUSION

For the foregoing reasons, the Petitioner should be denied on the inverse condemnation issue and sewer tax issue.

Respectfully submitted,

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Supreme Court, U.S.
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No. 99-1098

IN THE

Supreme Court of the United States

MICHAEL BARTH,

Petitioner,

v.

PUBLIC SERVICE ELECTRIC AND GAS; TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY; BERNARDS TOWNSHIP BOARD OF HEALTH; BERNARDS TOWNSHIP MUNICIPAL COURT; J. KNOX FELTER, JR., Senior Sanitarian, Bernards Township; PETER MESSINA, P.E., P.P., Township Engineer/Planner; PEGGY WARREN, Certified Tax Collector, Bernards Township; BARBARA J. PENCE, Township Administrator; J. DOE(S), individually and in their official capacities; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS, and various New Jersey State Statutes; A.D. RUNYON OIL COMPANY; HARRY P. BELDON, Attorney at Law,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PUBLIC SERVICE ELECTRIC AND GAS COMPANY

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QUESTIONS PRESENTED

Whether the District Court's Order of February 22, 1999 properly (a) granted summary judgment in favor of respondent PSE&G and (b) denied other relief sought by petitioner.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Public Service Electric and Gas Company, is a wholly-owned subsidiary of Public Service Enterprise Group and no publicly held company owns 10% or more of its stock.

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STATEMENT OF CASE

Petitioner's Statement of the Case includes numerous misstatements of fact. Respondent Public Service Electric and Gas Company ("PSE&G") offers the following as a correct account of the facts in this case.

A. The Subject Gas Line

Petitioner Michael Barth misrepresents that the subject gas-pipe or line installed by PSE&G was in any way substandard or defective. In fact, both the "temporary" and permanent line installed near petitioner's premises were in all ways proper, safe, and permitted by the necessary authorities. Petitioner's unsupported allegation that PSE&G installed such line in violation "of the Federal and New Jersey Pipeline Safety Acts" (Pet. Br., p. 6) has been rejected by every reviewing authority to which plaintiff has made this improper assertion, including the State of New Jersey's Board of Public Utilities, New Jersey's trial and appellate courts, the Federal District Court, and the United States Court of Appeals for the Third Circuit.

In his petition, petitioner misrepresents that PSE&G "intended to destroy" plaintiff's property. Pet. Br., p. 3. In fact, PSE&G has never damaged or harmed Petitioner's property. The subject gas main installation was performed in a manner that had no deleterious effect on PSE&G's easement or petitioner's abutting land. Petitioner's allegations concerning damaged trees (*id.*) and unauthorized entry onto petitioner's property (*id.*) are also without support and in no event are claims which warrant this august Court's review.

B. Procedural Background

This case arises from petitioner's property damage and other claims against PSE& G including tort claims and claims for violation of federal and state natural gas pipeline statutes. In 1993, PSE&G and Mr. Barth began negotiations for PSE&G to purchase an approximate 10 x 40 foot parcel in a remote corner of Mr. Barth's residential property in New Jersey; the subject parcel is approximately .001 percent of petitioner's fee and is appraised at a value of $200. PSE&G, one of New Jersey's regulated gas utility companies, had determined that it was necessary to furnish natural gas to occupants living in the vicinity of petitioner's home. PSE&G required the subject parcel in order to install a permanent natural gas main to permit gas service in that general locality.

When Mr. Barth refused to negotiate in good faith for the sale of the easement, PSE&G initiated and complied with State of New Jersey statutory and regulatory requirements to begin the process of condemnation. Despite petitioner's active opposition, New Jersey's Board of Public Utilities granted to PSE&G the right to proceed in state court against Mr. Barth, concluding that the land being sought was necessary for the service, convenience, and safety of the public and met the statutory requirements of *N.J.S.A.* 48:3-17.6. PSE&G eventually was authorized in the New Jersey State's courts to condemn the subject parcel. Following such authorization, and condemnation the "temporary" gas line which was installed adjacent to the petitioner's land was removed and replaced by a permanent gas main which was installed through the subject condemned parcel in August, 1998.

On April 14, 1997, petitioner filed a Complaint in the United States District Court against, *inter alia,* PSE&G seeking damages related to the aforesaid negotiations and the installation of the said gas lines. Mr. Barth also sought injunctive relief seeking, *inter alia*, PSE&G be ordered to remove the aforesaid temporary pipeline. By Orders dated May 7, 1997 and June 18, 1996 the Honorable Anne E. Thompson, C.J.U.S.D.C., denied Mr. Barth's request for injunctive relief. On April 27, 1998, The Third Circuit entered an Order affirming such orders of the District Court. On February 22, 1999 the District Court entered an Order granting summary judgment to PSE&G (and all other defendants). On September 28, 1999 the Third Circuit Court of Appeals affirmed the District Court's granting of summary judgment to PSE&G.

C. PSE&G's State Court Action against Petitioner

In May 1997, PSE&G filed the condemnation suit against Mr. Barth before the Honorable Wilfred J. Diana, Somerset County Superior Court of New Jersey. On September 11, 1997, Judge Diana entered judgment for PSE&G appointing three disinterested commissioners to value the property. Thereafter, Mr. Barth moved for an order enjoining PSE&G from entering the property. The Court rejected Mr. Barth's application, observing that:

> [o]n September 11, 1997, this Court entered judgment for PSE&G appointing three disinterested commissioners to value the property that is the subject of this condemnation action . . . Defendant [Barth] moved for the Court's reconsideration of that order, which motion was

also denied. The commissioners have met and determined the value of the property . . .

Now, Mr. Barth has once again asked this Court to enjoin PSE&G from entering on his property. It seems Mr. Barth's basis for the request is that he does not know of a recorded easement for the property in the name of PSE&G. For the following reasons, this Court has refused to entertain the new application.

A Complaint, Declaration of Taking and Order for Payment of Money into Court were filed at the beginning of this matter. Thereafter, a hearing was held and *it was determined that PSE&G had exercised its power of eminent domain appropriately.* It is the opinion of this Court that it is at that time that PSE&G was allowed the property. However, this matter has progressed further. The commissioners have met and made a determination as to the value of the property [$200.00]. They have submitted their recommendation and they have been compensated for their services. While it appears that Mr. Barth continues to appeal every order entered in this matter, *it is clear that PSE&G has every right, title and interest in the property that they have sought to take in this matter.* As such, this Court will not entertain an application to enjoin PSE&G from entering onto property which they properly have access to. (emphasis added)

On March 8, 1999, the New Jersey Appellate Division affirmed Judge Diana's rulings.

REASONS FOR DENYING THE WRIT

Petitioner has shown no basis for this Honorable United States Supreme Court to grant certiorari to reverse the grant of summary judgment to PSE&G nor to reverse any of the orders or alleged "inactions" of the courts below. Petitioner's claim of "national importance" in this, at best, unsubstantiated property damage/trespass action, is frivolous. Further, summary judgment was properly granted because petitioner has never offered any credible proof that any of PSE&G's gas lines were in any way substandard. Finally, none of petitioner's property or constitutional rights have been impaired.

I.

THE DISTRICT COURT PROPERLY FOUND THAT PETITIONER HAS NO STANDING TO SUE UNDER "GAS PIPELINE" STATUTES

At the outset it should be noted that, with regard to petitioner's Complaint averring purported federal question jurisdiction under 28 U.S.C. § 1331, insofar as PSE&G is concerned, while petitioner alleged violation of certain federal "Pipeline Safety Acts," (*see* Complaint, *Jurisdiction*, par. 1) the District Court found that, as a matter of law, Mr. Barth did not have standing to raise such claims. With regard to the Complaint's alleged constitutional deprivation claims no such claims were directed against PSE&G but rather were alleged against certain New Jersey statutes and, as such, PSE&G takes no position herein on the validity of jurisdiction allegedly arising from the United States Constitution.

In the case at bar, the District Court properly applied the appropriate standard in granting summary judgment to PSE&G. A review of the Court's February 22, 1999 Order reveals that the District Court noted that the "opposing party cannot rest upon mere allegations, but must present actual evidence that creates a genuine issue of material fact." Pet. App. P. B4. Mr. Barth has consistently failed to present any actual evidence in support of petitioner's myriad unsubstantiated complaints. Even at present, a review of the statements contained in petitioner's Brief reveals that they are wholly self-serving, unsupported by the record, and in most instances simply inaccurate or unintelligible.

In dismissing the "pipeline" act claims, the District Court stated:

> [t]hus, plaintiff's compensatory claims against PSE&G are barred under both acts and his claim for injunctive relief is barred under the New Jersey act. Moreover, even if the Court assumes that plaintiff satisfied the procedural prerequisites for filing an action for injunctive relief, . . . plaintiff failed in his opposition to PSE&G's summary judgment motion to set forth any factual evidence that creates a genuine issue of material fact.

Pet. App., pp. B5-B6.

In his Brief, Mr. Barth baldly states that the District Court "inappropriately misapplied the standard for summary judgment" (Pet. Br., p. 12) but he never explains any understandable basis for this allegation. Petitioner also claims the lower court erred in dismissing the "Federal Natural Gas Pipeline Safety Act" claim. Pet. Br., p. 11. Mr. Barth claims,

inaccurately, that the federal district court found that petitioner would be entitled to "injunctive" relief pursuant to such unidentified federal statutes. Pet. 13. Petitioner totally misreads the District Court's opinion. In this regard, the District Court properly surveyed potentially applicable statutes/regulations and observed that "[f]ederal law . . . does not permit a private person to bring an action for damages other than costs and fees" and that New Jersey law "does not permit a private person to bring an action for injunctive or compensatory relief." (Pet. App., p. B5)

Even at this juncture, petitioner continues to fail to show that he has standing to prosecute any of the cited statutes which purportedly govern the "temporary" natural gas line installed by PSE&G. Petitioner simply provides citations of statutes and regulations followed by his interpretation of what the provision requires, however, he fails to quote the actual provision or to argue how the provision applies to the issues at bar. Further, the scant case-law cited to is misplaced and inapplicable to the situation at hand. The courts below did not accept such a "shotgun" approach and instead properly required Mr. Barth to demonstrate specifically which statutes and regulations are being violated and the specific facts in support thereof.

Petitioner's primary opposition to the aspect of PSE&G's summary judgment motion related to such "pipeline" acts is rooted in Mr. Barth's lay opinion that the "temporary gas line" created a "public safety hazard." Pet. Br., p. 12. Contrary to petitioner's spurious allegation, PSE&G has never admitted that this line was installed in any improper fashion. In reality, both the "temporary" and the permanent gas lines were installed properly and safely and petitioner's exaggerated public safety claims are wholly baseless and were properly rejected below.

In Petitioner's Brief, Mr. Barth baldly states that the District Court "incorrectly assumed that since plaintiff had not provided an expert report, plaintiff could not set forth any actual evidence that creates a genuine issue of material facts." Pet. Br., p. 12. However it is clear the petitioner needed to, but did not, offer expert opinion concerning the subject gas installation. It is beyond dispute that the factfinder should not be permitted to speculate on matters which are clearly beyond the ken of the average juror. Mr. Barth's complaint engenders technical concerns of gas, gas piping and installation, safety and the like, and petitioner refused to support his lay conjecture with credible expert evidence. Petitioner's sole reliance upon two photographs of the scene have no foundation in the record; yet petitioner incredibly states that the pictures would allow a jury to "clearly determine PSE&G is liable . . ." Pet. Br., p. 12. Such an unsupported allegation should not be accepted. Since petitioner failed to identify any such "liability" expert, petitioner's Complaint against PSE&G on such grounds was rightfully dismissed. To date, Mr. Barth continues to fail to offer any credible evidence to create a material factual issue related to the safe installation of the gaslines, via expert opinion or otherwise, and accordingly the court's orders below should not be disturbed.

Notwithstanding the need or not for expert testimony nor that no credible proofs were produced by Mr. Barth which establish that any gas line was in any way substandard, the District Court properly found that plaintiff simply lacked standing to bring action under such "pipeline" acts. With regard to the federal "pipeline act" claims, it is clear that this petitioner does not have standing to bring such an action. In *Doak v. City of Claxton*, 390 F. Supp. 753 (S.D. Ga. 1975), jurisdiction was predicated upon the existence of a Federal question under the Natural Gas Pipeline Safety Act. Plaintiffs

alleged that pursuant to the Act certain federal safety standards were established by the Department of Transportation and that violations thereof caused the explosion at a poultry plant where plaintiffs were employed. Defendant Claxton moved to dismiss the complaint on the ground that the claim did not arise under the laws of the United States. *Id.* at 753-54. The *Doak* court noted that the statute was silent as to civil liability of pipeline companies for injury or damage resulting from alleged violations of safety standards prescribed by the Secretary. After a thorough review of the Act and the five factors which must be present before a private remedy can be implied, the *Doak* court held that this Act did not grant an implied private remedy to the plaintiff.

Petitioner has never even made a showing otherwise that the relied upon statutory provisions would even apply to the subject pipe installation. It is PSE&G's position that the subject gas distribution pipe or main is not the type of "pipeline" contemplated by these acts and therefore such statutes simply would not govern this installation nor this defendant utility company and are inapplicable to the matters at bar. Petitioner has not even attempted to refute this defense.

In sum, petitioner offers no legal or factual support for the "pipeline statute" claims. Further, in the absence of expert testimony which could explain this highly technical area of gas transmission and distribution and whether and how the instant application is somehow defective, the Court is without the necessary opinion testimony needed to support petitioner's claims. The District Court properly recognized this failure in petitioner's case and properly reached the correct conclusion in granting summary judgment to PSE&G.

II.

THE DISTRICT COURT PROPERLY APPLIED THE DOCTRINE OF *RES JUDICATA* TO BAR PETITIONER'S CLAIMS

Once disposing of petitioner's statutory pipeline claims, the District Court next held that "[p]laintiff's remaining claims against PSE&G are barred by the doctrine of claim preclusion, also known as *res judicata*." Pet. App. p. B6. In finding in favor of PSE&G, the District Court stated that:

> [P]laintiff's instant complaint and the New Jersey Superior Court condemnation action involve identical causes of action, parties and issues. Plaintiff does not challenge the validity of Judge Diana's order . . . That judgment was final . . . and entered after a trial on the merits."

Id. In Point V of his Brief, petitioner claims, without explanation, that the District Court's reliance upon the doctrines of *res judicata* to bar the plaintiff's action has somehow been foreclosed by the Supreme Court's holdings in cases "such as *Montana v. United States*, 99 S. Ct. 970, 973 (1979)." To the contrary, *Montana's* holding supports the District Court's decision. The District Court found that the underlying basis for Mr. Barth's instant complaint has already been litigated in the state courts where it was determined that PSE&G was fully entitled to the land pursuant to New Jersey's eminent domain law.

Notwithstanding petitioner's instant sweeping and unsupported allegation that the state court proceedings have been "constitutionally infirm," in reality, petitioner can point

to not a single instance where any of his rights were so impaired. Pet. Br., p. 14. With regard to petitioner's alleged constitutional deprivations, Mr. Barth fails to set forth any facts which show how any aspect of the process has been unconstitutional. It has been held that a landowner is not deprived of due process if there exists an adequate process to secure compensation. *See Stringer v. United States*, 471 F.2d 381, 385 (5th Cir. 1973). As detailed by Judge Diana, PSE&G was duly granted the easement and legally entitled to the property following a full process in which Mr. Barth enjoyed ample due process protection from unlawful taking.

III.

PETITIONER HAS SHOWN NO OTHER BASIS FOR REVERSAL OF THE DISTRICT COURT'S ORDER OF FEBRUARY 22, 1999 OR ITS PREVIOUS ORDERS

Petitioner seeks to reverse the February 22, 1999 District Court order which denied varied relief to petitioner below. For instance, petitioner moved to strike PSE&G's Answer for failure to answer interrogatories, however, Mr. Barth was furnished answers to interrogatories from PSE&G. Accordingly, the District Court properly denied petitioner's request. With regard to the other motions (to extend time for discovery, leave to file amended complaint, and leave to file late notice of claim), the District Court did not abuse its wide discretion, but instead provided ample reasoning by which petitioner's various motions were denied.

In Point V of his Brief, petitioner observes that the District Court, in a footnote, addressed the potential application of the New Jersey Tort Claims Act. Whether or not the Act does apply to this suit is moot since the Court

firmly established that "claim preclusion" would serve to bar petitioner's Complaint. Accordingly, at best, if the court's *dicta* was in error it was harmless and not a separate ground for reversal. With regard to alleged breach of contract claims presented by petitioner, petitioner incorrectly avers that PSE&G "never disputed the existence of a contract" between Barth and PSE&G." Pet. Br., p. 14. In fact, there is no contract and certainly no breach.

CONCLUSION

Petitioner has failed to demonstrate any "compelling reasons" for this Court to exercise its discretionary jurisdiction in this matter. Pet. Br., p. 8. The February 22, 1999 Order and Opinion of the District Court, granting summary judgment to PSE&G and denying petitioner's motion, was a correct application of the standard for summary judgment as well as a proper use of the court's discretion and accordingly, for all of the foregoing reasons, PSE&G respectfully requests the writ should be denied.

Respectfully submitted,

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(5)

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No. 99-1098

IN THE

Supreme Court of the United States

MICHAEL BARTH,

Petitioner,

v.

PUBLIC SERVICE ELECTRIC AND GAS; TOWNSHIP OF BERNARDS; BERNARDS TOWNSHIP SEWAGE AUTHORITY; BERNARDS TOWNSHIP BOARD OF HEALTH; BERNARDS TOWNSHIP MUNICIPAL COURT; J. KNOX FELTER, JR., Senior Sanitarian, Bernards Township; PETER MESSINA, P.E., P.P., Township Engineer/Planner; PEGGY WARREN, Certified Tax Collector, Bernards Township; BARBARA J. PENCE, Township Administrator; J. DOE(S), individually and in their official capacities; STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS COMMISSIONERS, and various New Jersey State Statutes; A.D. RUNYON OIL COMPANY; HARRY P. BELDON, Attorney at Law,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS [Listed Below]

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27pp

QUESTIONS PRESENTED

1. Whether the petitioner could establish the existence of any jury question as to his allegations that the respondent Bernards Township defendants (Township of Bernards, Bernards Township Sewage Authority, Bernards Township Board of Health, Bernards Township Municipal Court, J. Knox Felter, Jr., Peter Messina, Peggy Warren and Barbara J. Pence) violated his federal civil rights in any manner.

2. Whether the petitioner could avoid the bar of the procedural requirements of the New Jersey Tort Claims Act, and his failure to comply therewith, as to his damage claims under State law, against the Bernards Township defendants.

3. Whether the petitioner's Complaint sufficiently pleaded a cause of action for damages under the federal RICO statute.

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Petitioner's Appendix contains the opinions below that address the issues relating to the claims for damages against the Bernards Township defendants. Specifically, the opinion of the Court of Appeals for the Third Circuit, No. 99-5190, at page A2 of Petitioner's Appendix, and the opinion of the United States District Court for the District of New Jersey, Civil No. 97-2163, at page B1 of Petitioner's Appendix. These are unreported opinions.

STATEMENT OF JURISDICTION

Jurisdiction is pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner brought claims for violation of his civil rights, pursuant to 42 U.S.C. § 1983, and for conspiracy to commit such violations under § 1985; the civil rights alleged violated appear to be petitioner's rights to substantive and procedural due process of law, under the United States Constitution, Fourth and Fourteenth Amendments. Petitioner also alleged a civil cause of action under 18 U.S.C. § 1961, *et seq.* (the "RICO" statute), and a private right of action under the Flood Insurance Act, 42 U.S.C. § 4001. The New Jersey Tort Claims Act ("TCA"), N.J.S.A. 59:1-1, *et seq.*, is dispositive of petitioner's claims under New Jersey law, in particular N.J.S.A. 59:8-3, 59:8-4, 59:8-8 and 59:8-9.

N.J.S.A. 59:8-3 provides:

> No action shall be brought against a public entity or public employee under this act unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this chapter.

N.J.S.A. 59:8-4 provides:

> A claim shall be presented by the claimant or by a person acting on his behalf and shall include:
>
> a. The name and post office address of the claimant;
>
> b. The post-office address to which the person presenting the claim desires notices to be sent;
>
> c. The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted;
>
> d. A general description of the injury, damage or loss incurred so far as it may be known at the time of presentation of the claim;
>
> e. The name or names of the public entity, employee or employees causing the injury, damage or loss, if known; and
>
> f. The amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.

N.J.S.A. 59:8-8a provides:

> A claim relating to a cause of action for death or for injury or damage to person or to property shall be presented as provided in this chapter not later

than the ninetieth day after accrual of the cause of action. After the expiration of six months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity or public employee if:

> a. He failed to file his claim with the public entity within 90 days of accrual of the claim except as otherwise provided in section 59:8-9[.]

N.J.S.A. 59:8-9 provides:

> A claimant who fails to file notice of his claim within 90 days as provided in section 59:8-8 of this act, may, in the discretion of a judge of the Superior Court, be permitted to file such notice at any time within one year after the accrual of his claim provided that the public entity or the public employee has not been substantially prejudiced thereby. Application to the court for permission to file a late notice of claim shall be made upon motion supported by affidavits based upon personal knowledge of the affiant showing sufficient reasons constituting extraordinary circumstances for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this act or to file a motion seeking leave to file a late notice of claim within a reasonable time thereafter; provided that in no event may any suit against a public entity or a public employee arising under this act be filed later than two years from the time of the accrual of the claim.

STATEMENT OF THE CASE

This brief presents the position of the respondent Bernards Township defendants, as to petitioner's claims for money damages. Claims against Bernards Township for inverse condemnation have been addressed by separate counsel, here and in the courts below.

Petitioner instituted this action against the Bernards Township defendants, *inter alia*, alleging that various actions had deprived him of his federal civil rights, violated the federal RICO statute, and entitled him to damages under New Jersey Law. The actions complained of included the alleged regrading of an adjacent roadway and the installation of storm sewers elsewhere on the same road, both of which allegedly caused flooding on petitioner's property, and the respondents' efforts to compel petitioner to comply with the Township's ordinance requiring mandatory sewer connections, including a prosecution thereunder brought against the petitioner in the Township's Municipal Court, which proceedings were alleged, without foundation, to have been irregular. The regrading merely resurfaced the roadway and repaired subsidence; the storm sewers were subdivision improvements installed by a private developer. The Municipal Court proceedings were ultimately determined in petitioner's favor, after his compliance with the ordinance.

The claims for alleged civil rights violations were dismissed, as to the § 1983 claims, due to the existence of New Jersey's eminent domain statute, with inverse condemnation remedies, as an adequate remedy at State law, and for lack of proof of any violation of a protected civil right. The District Court also found a lack of proof of the supposed irregularities in the Municipal Court proceedings,

in the face of a tape log and affidavits recounting the procedure by which Municipal Court tapes are reproduced, by the staff of the Superior Court of New Jersey for Somerset County. The § 1985 claims were dismissed for lack of any allegation of class-based animus.

The RICO claim was dismissed as insufficient on its face, there being no specification of the alleged predicate acts.

The claims under New Jersey law were dismissed for failure to comply with the TCA notice requirements; this deficiency was, at the time of the District Court's decision, entirely incurable.

REASONS FOR DENYING THE WRIT

Petitioner's application for a writ of certiorari should be denied on the civil rights, RICO and New Jersey claims for damages, against the respondent Bernards Township defendants, under Rule 10 of the Supreme Court Rules for the following reasons:

1. The Third Circuit affirmed the District Court's granting of summary judgment in favor of the Bernards Township defendants, applying accepted and usual standards under Fed. R. Civ. P. 56, where as a matter of law, the existence of an adequate remedy under State law bars claims under 42 U.S.C. § 1983 for deprivation of property rights, the lack of any allegation of class-based animus renders a claim under 42 U.S.C. § 1985 insufficient, and the failure to file a timely notice of claim under the TCA bars tort actions for damages against public entities and public employees under New Jersey law. Similarly, the dismissal of petitioner's claims, arising from alleged irregularities in the Municipal Court proceedings, were

proper based on unrefuted documentary evidence. There is, therefore, no need for the Supreme Court to exercise its power of supervision. Rule 10(a).

2. The decision of the Third Circuit was not in conflict with the decisions of other United States Courts of Appeal, and applied accepted law and methodology. There is, therefore, no need for the Supreme Court to exercise its power of supervision. Rule 10(a).

3. The Third Circuit's decision of the claims under the Civil Rights Act and the RICO statute were consistent with existing precedent and accepted methodology, and not in conflict with applicable decisions of the Supreme Court. There is, therefore, no need for the Supreme Court to settle an important issue of federal Law. Rule 10(c).

SUMMARY OF THE ARGUMENT

Petitioner's claims, for damages under State law, as against the Bernards Township defendants, are defeated by his failure to comply with the procedural requirements of the New Jersey Tort Claims Act, specifically the requirement of written notice within 90 days of the accrual of the claim. The petitioner's motion to the District Court, for leave to file a late notice of claim, was out of time, in the wrong court, and insufficient under the statute, and thus properly denied.

Petitioner's claims, that the Bernards Township defendants violated his civil rights, are defeated by the absence of any allegation of class-based discrimination or animus, the rational basis for the defendants' actions, and the existence of adequate remedies at State law for the alleged injuries done to petitioner.

Petitioner's Complaint failed to sufficiently plead a cause of action for damages under the RICO statute.

ARGUMENT

I.

WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF THE CLAIMS FOR DAMAGES, UNDER NEW JERSEY STATE LAW, FOR FAILURE TO COMPLY WITH THE NOTICE PROVISIONS OF THE TORT CLAIMS ACT.

The *pro se* Complaint in this action alleges a number of claims for compensatory damages. To the extent those claims assert causes of action based on New Jersey, rather than federal, law, against the Township defendants, those claims are governed by the New Jersey Tort Claims Act ("TCA"), N.J.S.A. 59:1-1, *et seq.* The District Court held that petitioner's failure to comply with the TCA's requirement, that a written notice of claim be served upon public entities and their employees within 90 days after accrual, barred the State law claims; the District Court also denied petitioner's cross-motion for leave to file a late notice of claim.

A claimant is barred from asserting any claim for damages in tort against the Township defendants, under State law, until and unless he files a notice of claim, within 90 days after accrual, and thereafter allows the public entities and employees a period of six months to investigate and/or settle the same. N.J.S.A. 59:8-1, *et seq.* Petitioner's failure to comply is fatal, as to his State law claims for compensatory damages. N.J.S.A. 59:8-3; *e.g., Wood v. County of Burlington*, 302 N.J. Super. 371, 375-7 (App. Div. 1997). This is the short answer to petitioner's laundry list of State law claims that were assertedly dismissed with "no basis." Petition, at 18.

Petitioner has never contested his failure to comply with the TCA notice requirement. Rather, he asserts that the Township defendants are either estopped from asserting the defense, or have waived it. Petition, at 28. However, the cases cited in support of the estoppel argument, *Marley v. Palmyra*, 193 N.J. Super. 271 (Law Div. 1983), and *Anske v. Borough of Palisades Park*, 139 N.J. Super. 342 (1976), are both inapposite, in that the defendants in *Marley* failed to plead the defense at all, and the defense was pleaded belatedly, after extensive investigation of petitioner's oral report, in *Anske*. Petitioner also claims that the defense was waived by the Township defendants' failure to plead it, citing *Hill v. Board of Educ. of Middleton Tp.*, 183 N.J. Super. 36 (App. Div. 1982). This ignores the inclusion of the defense in the Township defendants' initial pleading herein.

Petitioner's argument, as to the cross-motion for leave to file a late notice of claim, ignores what the District Court could not: the plain language of N.J.S.A. 59:8-9 vests jurisdiction, to grant leave to file a late notice of claim, solely with judges of the Superior Court of New Jersey, and then only on motion filed within one year of the accrual of the claim. Failure to make the motion within a year of accrual deprives even the Superior Court of jurisdiction. *E.g., Iaconianni v. New Jersey Turnpike Auth.*, 236 N.J. Super. 294, 298 (App. Div. 1989), *cert. denied*, 121 N.J. 592 (1990), and cases there cited. Petitioner's cross-motion came more than a year after this action began, and thus was obviously untimely. Further, the statute allows such motions to be granted only upon a showing of "extraordinary circumstances" to explain the delay, a difficult standard which petitioner made no attempt to meet. *O'Neill v. City of Newark*, 304 N.J. Super. 543, 552 (App. Div. 1997) (plaintiff who lost use of leg not shown to be incapable of consulting

counsel), and cases there cited. Simply put, petitioner's cross-motion, to file a late notice of claim, was far too little, far too late, and addressed to the wrong court. The cross motion was, therefore, properly denied by the District Court.

Petitioner argues that the dismissal of the Complaint on TCA grounds should have been without prejudice, citing *Guerro v. City of Newark*, above. Petition, at 28. However, *Guerro*, here, addressed dismissal for failure to comply with the six-month waiting period between filing of a notice of claim and institution of a lawsuit. *Guerro* thus addresses different statutory language, and an entirely different question than that presented here. Neither *Guerro*, nor any other precedent, support the proposition that dismissal, for failure to comply with the basic notice of claim requirement under the TCA, is to be anything other than with prejudice.

For these reasons, it is respectfully submitted that the Court of Appeals properly affirmed the District Court's dismissal of the State law tort claims, and the denial of petitioner's motion to file a late notice of claim.

II.

WHETHER THE DISTRICT COURT PROPERLY RULED THAT PETITIONER HAD NOT ASSERTED A CLAIM FOR VIOLATION OF HIS CONSTITUTIONAL RIGHTS, UNDER 42 U.S.C. §§ 1983 AND 1985, THAT COULD WITHSTAND THE MOTION FOR SUMMARY JUDGMENT.

The Complaint includes conclusory allegations that the Township defendants violated petitioner's constitutional and civil rights. The District Court subjected each of these claims to detailed analysis, and found each one insufficient as a matter of law. The petitioner's arguments to the contrary, on this appeal, are without merit. The petitioner's claims in this respect, other than those in the nature of inverse condemnation, are addressed here; it is anticipated that, as in the District Court, other counsel will address the allegations of constitutional cast that relate to inverse condemnation.

Petitioner objects to the dismissal of his claim under 42 U.S.C. § 1985. Petition, at 24. However, the Complaint is insufficient, as a matter of law, to support the claim for damages asserted, for an alleged conspiracy to violate petitioners' civil rights, under 42 U.S.C. § 1985.

There are three essentially independent subsections to the cited statute. The dispositive language provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly,

> any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3). The first two subsections have no bearing on a case of this nature.

The difficulty with this claim is that the cited section is directed to invidious, class-based discrimination, and where, as here, there is no allegation of racial or other invidious class-based animus, the pleading is insufficient as a matter

of law. *Lake v. Arnold*, 112 F.3d 682, 685 (3d Cir. 1997); *see also Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, *reh. den.*, 464 U.S. 875 (1983) (holding § 1985(3) inapplicable where alleged discrimination was based on economic activity or status). Petitioner's argument in support of this claim fails to address this problem. Petition at 24. The argument that petitioner does present appears to address standing, to the extent it is intelligible, and entirely misses the point.

For these reasons, it is respectfully submitted that petitioner's claim under 42 U.S.C. § 1985 was properly dismissed by the District Court.

Petitioner also contests the District Court's dismissal of his civil rights claims under 42 U.S.C. § 1983. Petition at 5-26. He mistakenly asserts that the District Court never addressed the claim under this statute. *Ibid.* While it is not clear from the argument, it is possible that petitioner fails to understand that the cited statute does not create any rights, in and of itself, other than the right to bring an action for damages, for the violation of civil rights founded elsewhere.

Petitioner's constitutional claims, other than for inverse condemnation, arise from the repaving of the road, from the Township defendants having compelled him to connect to the municipal sewer system, and from the alleged failure to provide him with an opportunity to dispute the amount of taxes owed on his property. (Petitioner also claims to have been damaged by the Township's having failed to properly "supervise" the installation of his sewer connection, but petitioner does not, and cannot, identify any authority for the implicit proposition that the Township had any legal duty in this regard). Petitioner's argument does not even bother

to identify the supposed constitutional right infringed. The District Court, nevertheless, analyzed the claims under both the Equal Protection Clause and the Due Process Clause.

Petitioner's equal protection challenge, in the absence of any allegation of invidious, class-based discrimination, is to be evaluated on a rational basis test. *Rogin v. Bensalem Tp.*, 616 F.2d 680, 687-9 (3d Cir. 1980), *cert. den. sub nom. Mark-Garner Assocs., Inc. v. Bensalem Tp.*, 450 U.S. 1029 (1981). Petitioner does not allege that the Township's decision to regrade the bridge approach lacked rational basis; rather, he claims to have been injured by the consequences of the work. This is simply not sufficient, as a matter of law.

The equal protection challenge as to the enforced sewer connection is similarly without merit. As petitioner asserts, from his Complaint forward, the road regrading, on the southern border of his property, included a bridge approach. The bridge, obviously, traverses a stream that forms another boundary to petitioner's land, which, we are repeatedly told, suffers from a high water table. It should not then be surprising that the municipal authorities deemed the property inappropriate for continued use of a septic system, when the sewers became available. While the petitioner does assert that other properties in the Township are allowed to use septic systems, there is no assertion, much less proof, that any one or more of those properties are similarly situated; *i.e.*, petitioner makes no allegation or showing that another lot in the Township, with a high water table and within the service area of the sewer system, has been allowed to avoid connecting to the sewers and use a septic system.

Petitioner asserts that the District Court failed to recognize his "fundamental" protected property interest in

this analysis. Pb19. However, it is petitioner who fails to understand that the sort of "fundamental" interests considered, under the Equal Protection Clause, are those that would, in this context, distinguish one holder of property ownership rights from another, such as race, religion or political affiliation. *Rogin*, above. Petitioner's argument makes no effort to distinguish *Rogin*, or any of the cases cited in the District Court's analysis; neither does petitioner cite to any contrary authority.

Finally, there is no basis for the claim that petitioner had a viable private right of action under 42 U.S.C. § 4001. Petition, at 24-25. No such private right of action has ever been recognized in reported case law. Further, the assertion that permits were not obtained for the regrading ignores the fact that no such permits were required.

For these reasons, it is respectfully submitted that the District Court correctly held that petitioner cannot demonstrate any violation of his rights to equal protection of the laws.

Petitioner's arguments are similarly insufficient as to any supposed deprivation of due process of law. Municipal enforcement of sewer connection requirements are entirely proper exercises of the police power. *Stern v. Halligan*, 158 F.3d 729 (3d Cir. 1998) (enforcing public-water-connection requirement, finding no meaningful distinction from arguably more compelling public justification for sewer connection requirement). Petitioner argues that there were procedural irregularities before the Municipal Court, but he was not damaged thereby (except, by his allegation, the resulting compulsion to connect to the sewers), since he was not convicted of the charge. His other procedural due process

claims are answered by the existence of adequate remedies at State law: any actual damage to petitioner's property (assuming, *arguendo*, such could be proved) could have been remedied by an action for inverse condemnation (or other relief, *e.g.*, to abate an alleged nuisance) in the New Jersey Superior Court, and this is an adequate post-deprivation remedy under State law. His claim that Felter interfered with his contract to purchase another property, where the septic system had failed, would in like manner have been reviewable by the Superior Court, had petitioner proceeded with the transaction and been subject to enforcement activity by Felter (although this entire aspect of petitioner's action is specious, since it is apparent that the transaction must have failed due to the unusable septic system itself). The State law remedies, in turn, provided petitioner with the process to which he was due, and there was, therefore, no constitutional violation. *E.g., DeBlasio v. Zoning Bd. of Adj., Tp. of West Amwell*, 53 F.3d 592, 596-7 (3d Cir. 1995), and cases there cited. The same opinion also addresses substantive due process arguments, holding that such a claim requires evidence that the challenged governmental action was arbitrary and based on considerations outside the legitimate merits thereof, such as the personal or familial interest alleged therein. 53 F.3d at 599-600. There is no suggestion, in the present Complaint, that any of the actions taken or decisions made by the Township defendants were of such character. It may thus be seen that there is no constitutional claim, and therefore no cause of action for damages under 42 U.S.C. § 1983.

The same arguments defeat any constitutional claims for damages, for the same injury, cast differently in trespass or nuisance, as in Counts X and XI of the Complaint.

Petitioner cannot recover damages for the alleged constitutional violations arising from the tax sale, as asserted in Counts XII-XXI. The claim appears to be one based on procedural due process; as noted above, an adequate State remedy defeats the claim. New Jersey's courts have always been available to review challenges to a tax sale. *E.g., Nordell v. Township of Mantua*, 45 N.J. Super. 253 (Ch. Div. 1957) (sustaining challenge to tax sale and subsequent *in rem* foreclosure).

For all of these reasons, it is respectfully submitted that the Court of Appeals properly affirmed the District Court's dismissal of petitioner's claims, for alleged violations of his civil and constitutional rights, under 42 U.S.C. §§ 1983 and 1985.

III.

WHETHER THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S ALLEGED CLAIM UNDER THE RICO STATUTE.

The Complaint also alleged a cause of action under the RICO statute, 18 U.S.C. § 1961, *et seq*. This claim was based on the alleged sidebar conversations in the Municipal Court proceeding, and an alleged failure to supply petitioner with complete and unedited copies of the courtroom tape records, which, according to petitioner, rendered the Township defendants "liable for Fraud, Malicious and Tortious Interference with a Contractual Relationship, Malicious Prosecution, Abuse of Process, Negligence, and Conspiracy to Violate Petitioner's Rights." The District Court correctly dismissed the RICO claim as insufficient on the pleadings.

It is correct that, as petitioner notes, the RICO claim was not addressed in the Township defendants' original moving papers. However, their reply letter brief pointed out that the Complaint lacked the most fundamental aspect of a properly pleaded RICO claim, an allegation of a pattern of racketeering based the predicate acts specified in the statute. Pa. Based on this pleading deficiency, and others noted in the Opinion, the District Court held the pleading insufficient to state a RICO claim.

Petitioner argues that the alleged sidebar conferences in the Municipal Court were intended to obstruct justice in the District Court, to which the petitioner had, at the time, removed the Municipal Court proceeding against him. Petition, at 5. Petitioner speculates that the substance of the conversation was plotting how to "defraud the federal district court out of jurisdiction" of the case. *Ibid.; see also* Petition at 15, where petitioner states only that he could hear the individuals whispering. The argument assumes that a quasi-criminal case in a municipal court may properly be removed to a federal district court, that there are any means by which a federal district court could be defrauded of its (assumed) jurisdiction over such a case, and that a conspiracy to so (assumedly and allegedly) defraud the federal court of its (assumed) jurisdiction would be discussed by three individuals, two of whom were practicing attorneys (the municipal Judge and prosecutor), at the front of an open courtroom and in the presence of the intended victim (petitioner) rather than behind closed doors. It is respectfully submitted that each of these assumptions is absurd, taken separately, and that the petitioner's argument, that relies on these assumptions taken together (along with the assumption that the petitioner "knows" what was said in a conversation he admits he could not hear and has no other evidence to document), is frivolous.

Since obstruction of justice is the only supposed offense of the defendants, as pleaded by the petitioner, that falls within the extensive catalogue of predicate acts of racketeering activity, as defined by 18 U.S.C. § 1961(1), and the allegations of that offense are, as shown above, utterly incredible, the petitioner clearly failed to plead a pattern of racketeering activity, necessary to any RICO claim, and the District Court's holding to that effect was clearly correct.

Petitioner characterizes the dismissal of this claim as *sua sponte* and without notice. However, petitioner made no effort to respond, before the District Court, to the argument presented in the reply letter brief, thus exposing as frivolous his argument, first made here, that this aspect of the decision deprived him of an opportunity to be heard. The supposed RICO claim was so clearly and utterly insufficient that it must be respectfully submitted that any error, if error there were, in the District Court's dismissal of that claim, in the course of the disposition of the Township defendants' motion (as opposed to requiring an additional motion directed to the RICO claim), was clearly harmless.

For these reasons, it is respectfully submitted that the Court of Appeals properly affirmed the District Court's dismissal of the petitioner's RICO claim against the Township defendants.

IV.

WHETHER THE REMAINDER OF THE PETITIONER'S ARGUMENTS, AS TO HIS CASE AGAINST THE TOWNSHIP DEFENDANTS, ARE WITHOUT MERIT.

In addition to the arguments addressed above, and those properly directed to other defendants and to counsel for the Township defendants on claims other than for non-inverse-condemnation compensatory damages, petitioner asserts here that his motions, for leave to file an amended complaint, to extend discovery, to impose sanctions for failure to provide discovery, to enter default judgment and for costs and fees, were incorrectly denied, and that the District Court erred in vacating default against the Bernards Township Sewerage Authority. These arguments are without merit.

Petitioner makes no attempt to respond to the rationale for these rulings, set forth in the District Court's Opinion. Indeed, petitioner presents no citation to authority, nor any argument at all, save to characterize each point as "clear" based on the "record" or the "analysis above." Petitioner does not even condescend to include his proposed amended pleading in his Appendix, much less present a scrap of discussion explaining why he differs with the District Court's rejection of the same as futile.

It is, therefore, respectfully submitted that no further response is necessary, to petitioner's arguments that are as totally devoid of substance as of merit. It is further submitted that there is no basis for disturbing the pertinent rulings of the District Court.

V.

PETITIONER'S MISREPRESENTATIONS OF FACT AND LAW.

It is respectfully submitted that the misrepresentations of fact and law, set forth in the Petition, are too extensive to state fully within the page limits of the Rules of this honorable Court, beyond those identified above.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that there is neither any need nor any basis for granting the Petition.

Respectfully submitted,

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Attorney for Respondents Township of Bernards, Bernards Township Sewage Authority, Bernards Township Board of Health, Bernards Township Municipal Court, J. Knox Felter, Jr., Peter A. Messina, Peggy Warren and Barbara J. Pence, as to Compensatory Non-Inverse Condemnation Damage Claims Only
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